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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1936

No. 254

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, PETITIONERS

vs.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

PETITION FOR CERTIORARI FILED AUGUST 7, 1936

CERTIORARI GRANTED OCTOBER 12, 1936

SUPREME COURT OF THE UNITED STATES

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1 [Captions omitted.]

2 In Supreme Court of the District of Columbia Holding an Equity Court

No. 57784

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, PLAINTIFF

vs.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, DEFENDANTS

Bill of complaint

Filed October 3, 1934

The plaintiff, Deutsche Bank und Disconto-Gesellschaft, a Corporation, by Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., its attorneys, brings this bill against Homer S. Cummings as Attorney General of the United States and W. A. Julian as Treasurer of the United States and respectively represents:

1. That plaintiff is a corporation duly organized and existing under and by virtue of the laws of Germany with its principal place of business at Berlin, Germany.

2. That defendant Homer S. Cummings is the duly appointed, qualified, and acting Attorney General of the United States and is sued herein as incumbent of said office.

3. That the defendant W. A. Julian is the duly appointed, qualified, and acting Treasurer of the United States and is sued herein as incumbent of said office.

4. That this is a suit of a civil nature brought under the laws of the United States, namely, an act of Congress known as the Trading with the Enemy Act approved October 6, 1917, and the acts amendatory thereto and all executive orders and acts proclaimed and made in alleged conformity therewith and pursuant to the general jurisdiction and powers of this Court.

5. That heretofore, in or about the year 1929, the Deutsche Bank und Direction der Disconto Gesellschaft, banking corporations organized and existing under the laws of Germany, duly consolidated into a single corporation organized under the laws of the Republic of Germany, to wit, the Deutsche Bank und Disconto Gesellschaft.

3 6. That after said merger the assets of said Direction der Disconto Gesellschaft became the property of plaintiff herein, Deutsche Bank und Disconto Gesellschaft, under which name the corporation created by said merger did and is still doing business.

7. That sometime prior to March 9, 1928, the then Alien Property Custodian purporting to act under and by authority of the Trading with the Enemy Act as amended, determined the said Direction der Disconto Gesellschaft to be an enemy and pursuant to demands did seize and possess himself of the property of said Direction der Disconto Gesellschaft in the United States, which property now belongs to the plaintiff, Deutsche Bank und Disconto Gesellschaft.

8. That the said property so seized and taken prior to the 16th day of February 1933 was held by the said Alien Property Custodian or deposited by him in the Treasury of the United States to his credit in various trusts and then transferred to a single trust known as Trust No. 49851. The property now being held in said trusts consists of the following:

Fifty shares of South Porto Rico Sugar Company preferred stock;
$115,500 St. Louis San Francisco Prior Lien 4's;
$2,250 U. S. Liberty Bonds, and
Cash in the amount of $541,041.44, together with any and all accrued returnable income.

9. That prior to the 16th day of February 1933, and pursuant to the provisions of the Trading with the Enemy Act as amended and the Settlement of War Claims Act, the plaintiff herein and/or its predecessor filed its notice of claim under oath with the Alien Property Custodian containing such particulars as required by law and by the rules and regulations of the Alien Property Custodian and made application to the President of the United States for the return to it of said property.

10. That prior to the commencement of this action the then Alien Property Custodian determined that the plaintiff herein was the owner of said property and entitled to the return of said property as provided for by the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

11. That on or about the 16th day of March 1931, pursuant to a warrant of attachment obtained in an action brought by
4 William H. Sprunt and others in this Court, against the plaintiff herein, the said property was levied upon by the Marshal of this Court and the return of said property to the plaintiff herein withheld because of the levy of the warrant of attachment.

12. That said action brought by William H. Sprunt and others was on or about the 24th day of May 1934 by an order of this Court, discontinued and said warrant of attachment by virtue of the discontinuance became non-existent, null and void, and that said discontinuance was requested by plaintiff in said action without the payment of any sums of money or property on the part of the plaintiff herein to said Sprunt and others, the plaintiffs in said action.

13. That after the dismissal of said action brought by William H. Sprunt and others and prior to June 27, 1934, the plaintiff herein made demand upon the Alien Property Custodian for the release to it of the property mentioned herein but the Alien Property Cus-

todian arbitrarily and capriciously and without warrant of law failed and refused to release to the plaintiff said property.

14. That by virtue of an executive order, No. 6694, issued by the President on May 1, 1934, which became effective on July 1, 1934, the office of the Alien Property Custodian ceased to exist and all the authority, rights, privileges, powers, and duties conferred and imposed on the Alien Property Custodian by law and/or executive orders were transferred to the Department of Justice to be administered under the supervision of the Attorney General; that all property real and personal, choses in action and all other property of whatsoever kind in the possession or under the control of the Alien Property Custodian or which was held in trust for him by the Treasurer of the United States was transferred to the Attorney General of the United States.

15. That after the abolishment of the office of the Alien Property Custodian and the transfer of all property in his possession or under his control to the Attorney General of the United States as mentioned in the preceding paragraph, and prior to the commencement of this action the plaintiff herein demanded the return of said property from the defendants herein but said demand has been refused upon the ground that pursuant to the provisions of Public Resolution No. 53, providing as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled. That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: Provided, however, That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this Resolution: Provided further, That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed

under this resolution: And provided further, That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review."

the return of said property was being withheld.

16. Upon information and belief the plaintiff alleges that said Public Resolution No. 53 is contrary to the provisions of the Constitution of the United States and is null and void in that it attempts to deprive the plaintiff herein of its rights, privileges and
6 properties secured to it by the Constitution of the United States, to wit, it deprives plaintiff of its property without due process of law in contravention of amendment Five of the said Constitution.

Wherefore, the Plaintiff Prays:

(1) That a subpoena issue out of this Honorable Court directed to the defendants Homer S. Cummings as Attorney General of the United States and W. A. Julian as Treasurer of the United States, commanding them and each of them to appear herein and answer this Bill of Complaint.

(2) That upon a final hearing of said cause a decree be entered herein directing the return of said property, to wit:

Fifty shares South Porto Rico Sugar Company preferred stock;
$115,500 St. Louis San Francisco Prior Lien 4's;
$2,250 U. S. Liberty Bonds, and
Cash in the amount of $541,041.44 together with any and all accrued returnable income.

(3) That all proper orders and decrees may be made and proper inquiries directed, and that all such other and further and general relief may be afforded plaintiff as the nature of the case may require, and as to the Court may seem meet and proper.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT,
By THOS. H. CREIGHTON, JR., *Attorney.*

[*Duly sworn to by Thomas H. Creighton, Jr.; jurat omitted in printing.*]

7 In Supreme Court of District of Columbia

Motion to dismiss

Filed October 24, 1934

* * * * * * *

Now come the defendants, Homer S. Cummings, as Attorney General of the United States, and W. A. Julian, as Treasurer of the United States, and move this honorable Court to dismiss the bill of complaint upon the ground that this Court has no jurisdiction to entertain the plaintiff's bill because, by Public Resolution 53, 73d Congress, amending the Settlement of War Claims Act of 1928, ap-

proved by the President on June 27, 1934 (48 Stat. 851), the return of the property of the plaintiff as prayed for in said bill of complaint has been postponed and the money or property and the income, issues, profits, and avails thereof reserved.

GEORGE C. SWEENEY,
Assistant Attorney General,
LESLIE C. GARNETT,
United States Attorney,
HARRY LEROY JONES,
Attorney,
Attorneys for the Defendants.

Received a copy of the foregoing motion to dismiss and of the defendants' memorandum of points and authorities in support thereof this 24th day of October 1934.

THOS. H. CREIGHTON, Jr.,
Solicitor and Attorney for Plaintiff.

8 In Supreme Court of District of Columbia

Memorandum of court

Filed March 12, 1935

* * * * * * *

I think that Congress has full power to dispose of enemy property seized by the Alien Property Custodian, and make such changes in regard to that disposition as may from time to time seem advisable. The courts have uniformly held that a suit against the Alien Property Custodian is a suit against the United States, and have also held that Congress may grant and may withdraw the privilege of bringing suit against the United States. When that privilege is withdrawn, the courts are powerless to act.

I can see nothing unconstitutional in the withdrawal by Congress of this privilege, and the motion to dismiss the bill of complaint should be sustained.

BAILEY, *J.*

In Supreme Court of District of Columbia

Order and decree

Filed March 29, 1935

* * * * * * *

This cause coming on to be heard before me on the defendants' Motion to Dismiss the Bill of Complaint filed herein, and the parties hereto being represented by their respective counsel, and after argument upon the questions raised by said Motion, and the Court being fully advised in the premises, it is this 29th day of March 1935,

Ordered, adjudged, and decreed that the said Motion to Dismiss the Bill of Complaint be, and the same hereby is, sustained and that said Bill of Complaint be, and the same hereby is, dismissed with costs to plaintiff.

JENNINGS BAILEY,
Justice.

In Supreme Court of District of Columbia

Order allowing appeal

From this Decree, plaintiff in open court hereby notes an appeal, and the said appeal is hereby allowed to the Court of Appeals and bond is hereby given at $100 or $50 cash deposited in lieu thereof.

JENNINGS BAILEY,
Justice.

9 Service of copy acknowledged and form of order consented to.

THOS. H. CREIGHTON, JR.,
Attorney for Plaintiff.

Memorandum

April 2, 1935. $50 deposited in lieu of bond on appeal.

In Supreme Court of District of Columbia

Assignment of errors

Filed April 2, 1935

* * * * * * *

Now comes the Deutsche Bank and Disconto Gesellschaft, a corporation, plaintiff in the above entitled cause, by its attorneys, Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., and assigns as errors in the above entitled cause the following:

(1) The Court erred in granting defendants' motion to dismiss.

(2) The Court erred in holding that Public Resolution 53, 73d Congress, is constitutional.

(3) The Court erred in holding that this Court had no jurisdiction to entertain the plaintiff's bill.

THOS. H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
Attorneys for Plaintiff.

Service of copy of the foregoing Assignment of Errors is hereby acknowledged this 2nd day of April 1935.

HARRY LEROY JONES,
Attorney for Defendants, Homer S. Cummings, Attorney General, and W. A. Julian, Treasurer of the United States.

10 In Supreme Court of District of Columbia

Docket entries

* * * * * * *

Date	Proceedings	Deposits	Fees	Total
1934				
Oct. 3	Deposit of costs by Creighton	10—		10—
"	Bill, Appearance, Order to file, filed.			
"	Spa. to Answer & copies (2) issued. Ret. Served 1 & 2 10-3-34.			
" 24	Motion of deft. to dismiss bill, Ack & P & A. App. Geo. C. Sweeney, Leslie C. Garnett & Harry LeRoy Jones, filed.			
" 26	Stipulation ext. time to Nov. 30/34 to file P & A. in opposition to dismiss bill, filed.			
Nov. 21	Stipulation ext. time to Jan. 15, '35 to file P & A. in opposition to dismiss bill, filed.			
1935				
Jan. 7	Stipulation ext. time to Feb. 15, '35 to file P & A. in opposition to dismiss bill.			
Feb. 14	P. & A. of Pltf. in opposition to motion to dismiss.			
Mch. 12	Memorandum opinion of Bailey, J., filed.			
" 29	Order sustaining motion to dismiss Bill, with costs; appeal noted. (Bailey, J.)			
Apr. 2	$50.00 deposited by Thos. H. Creighton, Jr. in lieu of bond on appeal	50—	5—	5—
"	Add deposit by Thos. H. Creighton, Jr.	5—		
"	Assignment of Errors, filed.			
"	Designation of Record, filed.			

11 In Supreme Court of District of Columbia

Designation of record

Filed April 2, 1935

* * * * * * *

Now comes Deutsche Bank and Disconto Gesellschaft, a corporation, plaintiff in the above entitled cause, by its attorneys, Thomas H. Creighton, Jr., and Adna R. Johnson, Jr., and designates and directs the Clerk to print the parts of the record which they desire to have included in the transcript, said parts being considered sufficient for the determination of the question raised on appeal, namely:

(1) Bill of Complaint filed herein on October 3, 1934,

(2) Motion to Dismiss Bill of Complaint filed herein on October 24, 1934,

(3) Memorandum of Court (Bailey, J.,) filed herein on March 12, 1935,

(4) Final Decree filed herein on March 29, 1935,

(5) The Assignment of Errors,

(6) The Docket Entries, and

(7) This Designation.

THOS. H. CREIGHTON, JR.,
ADNA R. JOHNSON, JR.,
Attorneys for Plaintiff.

Service of copy of foregoing Designation of Record is hereby acknowledged this 2nd day of April 1935.

HARRY LEROY JONES,
Attorney for Defendants, Homer S. Cummings, Attorney General, and W. A. Julian, Treasurer of the United States.

[Clerk's Certificate to foregoing transcript omitted in printing.]

12 [File endorsement omitted.]

13 In United States Court of Appeals for District of Columbia

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT

vs.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN AS TREASURER OF THE UNITED STATES

Minute entry of hearing

December 5, 1935

The argument in the above entitled cause was commenced by Mr. James J. Lenihan, attorney for appellant, and was continued by Mr. Harry LeRoy Jones, attorney for appellees, and was concluded by Mr. James J. Lenihan, attorney for appellant. Appellant allowed to file reply brief with leave to appellees to answer if so advised.

14 In United States Court of Appeals for the District of Columbia

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, APPELLEES

Appeal from the Supreme Court of the District of Columbia

Argued December 5, 1935—Decided February 17, 1936

Thos. H. Creighton, Jr., and James J. Lenihan, both of Washington, D. C., and Otto C. Sommerich, of New York City, for appellant.

Leslie C. Garnett, United States Attorney, and Harry LeRoy Jones, Frank C. Sterck, and Edward First, all of Washington, D. C., for appellees.

Opinion

Before MARTIN, C. J., and ROBB, VAN ORSDEL, GRONER, and STEPHENS, JJ.

GRONER, J.: Appellant is a consolidated corporation of Germany with its principal place of business in Berlin. Its predecessor company, Direction der Disconto-Gesellschaft, was an enemy alien whose property was seized by the Alien Property Custodian and subsequently converted into money and other property and deposited by him in the Treasury of the United States to his credit in a single trust known as trust number 49,851. The bill alleges:
"that prior to the 16th day of February 1933 and pursuant to the provisions of the Trading with the Enemy Act as amended and the Settlement of War Claims Act, the plaintiff herein and/or its predecessor filed its notice of claim under oath with the Alien Property Custodian containing such particulars as required by law and by the rules and regulations of the Alien Property Custodian and made application to the President of the United States for the return to it of said property. * * * That prior to the commencement of this action the * * * Alien Property Custodian determined that the plaintiff herein was the owner of said property and entitled to the return of said property as provided for by the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928."

The bill then alleges that, before delivery of the property to appellant, one Sprunt and others brought an attachment proceeding against appellant, claiming rights in the property in question—that this proceeding was dismissed by final decree the 24th of May 1934 and that thereafter appellant made due demand for the property, and that demand was refused, because of the provisions of Public Resolution No. 53.[1]

The suit below was for a hearing and decree directing the return of the property. The lower court dismissed the bill for lack of jurisdiction.

The history of our war-time legislation with reference to enemy property found in the United States has been detailed and discussed so many times over the past fifteen years by the Supreme Court and this court, that little can be said here that would not be repetition. For our present purposes, it is enough to say that shortly after the entry of the United States into the World War, Congress passed the Trading with the Enemy Act,[2] under the provisions of which the United States took possession of all enemy property and held and used it for the period of the war and for sometime thereafter. The purpose of Congress with relation to property seized is shown by the reports of the committees of Congress, and by the Act itself, to have

[1] (of June 27, 1934, 48 Stat. 1267.)
[2] 40 Stat. 411.

been in whole-hearted accord with the modern usage and practice of nations—usage and practice which disclaims the right of confiscation. For instance, while the bill was under consideration, Secretary Redfield, explaining on behalf of the administration its objects to the committee on commerce, said that the creation of the office of Alien Property Custodian was in line with the desire of the administration to show that the policy to be pursued by the United States with relation to property of enemy nations was the opposite of confiscation (Hearings, May 29, 1917, p. 13). Likewise the committee, in reporting the bill, stated, "a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it" (Report No. 113. Committee on Commerce, 65th Cong., 1st Session).

The Act, in Section 12, declares that "after the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the Alien Property Custodian or deposited in the United States Treasury, shall be settled as Congress shall direct." And Congress shortly after the war adopted a policy of piecemeal return of the property to its former owners. In the recent case of Woodson v. Deutsche, etc., 292 U. S. 449, the Supreme Court, speaking to this section of the Act, said:

"Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury 'shall be settled as Congress shall direct.' 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during and after the war."

16 In view of this interpretation of the Section by the Supreme Court in the above named case—as well as many others preceding it—it may now be considered as settled law that the seizure of enemy property carried with it the right on the part of the United States—if exercised—to dispose of it. But it may be said to be equally settled by a consistent line of congressional enactments that the purpose of the United States never was confiscation and that confiscation never was resorted to. The effect, therefore, of the legislation was to transfer possession and title to the Custodian for the purpose of conversion into money, etc., while at the same time preserving in the original owner a contingent beneficial interest; that is to say, an interest subject to such conditions as Congress might thereafter affix to its return. This purpose of Congress to which we have referred is shown also by the legislation—which may be described as preliminary legislation—after the conclusion of the war; i. e., the act providing for the return of the property of Ameri-

can wives of Germans;[3] for the return of property to citizens of Czechoslovakia and other countries who were at the time of seizure citizens of Austria Hungary;[4] the Winslow Act of March 4, 1923, directing the return up to $10,000.00 to every owner, including German owners, and of income up to $10,000.00 annually on property held by the Custodian, to every owner, including German owners.[5]

The war was officially declared ended July 2, 1921.[6] This was followed August 25, 1921, by the Treaty of Berlin[7] and by the establishment, August 10, 1922, of the Mixed Claims Commission.[8]

The Commission was created to determine the amount of money which Germany should pay to the United States in satisfaction of its financial obligations under the Treaty of Berlin, and was followed by the Debt Funding Agreement of 1930, making a settlement of claims of the United States and of its citizens against the German Government. By its terms Germany agreed to pay forty million odd reichmarks annually from September 1, 1929, to March 31, 1981. But in 1928—two years before the Debt Funding Agreement—Congress passed the Settlement of War Claims Act,[9] "To provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian."

The plan provided, subject to certain exceptions not material here, that when the person entitled to the property—i. e., the German enemy—had filed written consent to a postponement of the return of an amount equal to twenty per centum of the aggregate value of the money or property, the President might order its payment or delivery; and in the event it was not delivered the former owner might institute suit in equity as provided by subsection (a) of Sec. 9 of the Trading with the Enemy Act. Subsection (a) in turn provided: "If the President shall not so order within sixty days after the filing of such application or if the claimant shall have
17 filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * *"—and the court may "make and enter * * * all such orders and decrees, and * * * issue such process as may be necessary and proper * * * to enforce the provisions of this act" (Sec. 17).

In short, Congress in the War Claims Act directed the return in part to its German owners of the property seized by the Alien Property Custodian, provided they would consent in writing to the postponement of the delivery of an amount equal to 20%. It also, as we

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[3] 41 Stat. 977.
[4] 41 Stat. 977.
[5] 42 Stat. 1511.
[6] 42 Stat. 105.
[7] 42 Stat. 1939.
[8] 42 Stat. 2206.
[9] 45 Stat. 254.

have seen, provided recourse to the courts for the establishment of their claims and for a decree for the return of the property.

The bill in this case alleges that the appellant has filed notice of claim and consent as required by the Act, to the postponement of the return of an amount equal to 20% of the value of its seized property, but that by reason of the passage by Congress of a resolution known as Public Resolution No. 53 of June 27, 1934, the Attorney General, as acting Custodian, has refused to recognize appellant's right or to make delivery of its property.

It is conceded that under the provisions of the Act approximately 95% of the property taken by the Custodian under the Trading with the Enemy Act has been returned to its former owners—of the same class as appellant—; and appellant's position on this appeal is that Congress, having in the Act directed the return of 80% of the property on condition that the original owner would postpone demand for the remaining 20%, the right of appellant to the 80% was fixed by the law in force when it filed its consent to the use of such 20% by the United States for the purpose set forth in the Act (the fund representing the 20% was paid into the special deposit account for distribution to American claimants against Germany).

In other words, that Congress, having revested title in the former owner, it cannot constitutionally destroy this vested right by subsequent legislation.

Appellant says that it cannot be fairly contended that as to the 95% of seized property already delivered under the provisions of the Act, Congress has the right by the passage of subsequent legislation, to reseize the property;—and that, if this is true, it insists the mere act of physical delivery in the one case, postponed in the other by the filing of an attachment suit by a third party, cannot enlarge the right.

The question is of great importance.

On June 27, 1934, Congress passed Public Resolution No. 53 (48 Stat. 1267). In its preamble the Resolution refers to a joint resolution of July 2, 1921, in which Congress declared that the property of German nationals seized by the United States should be retained "except as shall have been heretofore or specifically hereafter shall be provided by law * * *" until the German Government has made suitable provision for the satisfaction of claims of American nationals. The Resolution then recites the subsequent treaty between the United States and Germany, the establishment of the Mixed Claims Commission, and the Debt Funding Agreement of June 23, 1930, in which Germany agreed to pay the United States certain sums of money annually in satisfaction of awards made by
18 the Mixed Claims Commission; and then declares that Germany has failed to keep that engagement and, therefore, so long as Germany is in arrears, any and "all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under

the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved", etc., etc.

The President is authorized in his sole discretion to remove the restriction and likewise to determine the period or periods in which Germany is in arrears in payment.

From what has been said, it is obvious that, except for the passage of this Resolution, appellant on dismissal of the attachment suit would have received the money and securities which, as the bill alleges, the Alien Property Custodian had determined it was entitled to receive. And this brings us to the question whether in view of the passage of the Resolution, the suit can be maintained.

The lower court was of opinion that the effect of the Resolution was to withdraw the consent of the United States to be sued. We are of opinion that the language of the Resolution does not go so far.

Undoubtedly this is a suit against the United States and can only be maintained if the United States has given its consent to be sued. Von Bruning v. Sutherland, 29 F. (2d) 631, 58 App. D. C. 258; Banco Mexicano v. Deutsche Bank, 289 F. 924, 53 App. D. C. 266, affirmed by the Supreme Court, 263 U. S. 591. But, as we have pointed out, Section 11 of the Settlement of War Claims Act of 1928, authorizing former enemy owners to proceed under subsection (a) of Sec. 9 of the Trading with the Enemy Act, specifically gives a right of action to such enemy owners to proceed in the Supreme Court of the District of Columbia to establish their claims and to have a final decree for restoration. And while, as we think, Congress retained the power to withdraw the consent at any time—Lynch v. United States, 292 U. S. 571, 581—until withdrawn the privilege to sue cannot be challenged. And, in the view we take of the language used by Congress in the Resolution, nothing there can be said to constitute a withdrawal of consent. Certainly there is no apt language used to that effect. And we take it to be true that the same formality necessary to create the right is equally necessary to its withdrawal. The Resolution is not confiscatory of the property here in suit. It is not, as we think, a withdrawal of consent to be sued. And the omission or failure so to declare, we cannot think was inadvertent—if for no other reason—because it is now a well recognized principle that, though no sovereignty can be arraigned before any tribunal without its consent, yet on the other hand, that its own tribunals should be open to causes in which the sovereign is a party with as much freedom as between private parties (Vat. Int. Law, B. 1, Sec. 164). In this view, it follows necessarily that the lower court was in error in dismissing the bill. And this brings us to the main question whether the Resolution is or is not violative of the provisions of the Fifth Amendment of the Constitution of the United States.

19 In S. S. Company v. Joliffe, 2 Wall, 450, Mr. Justice Field stated the rule as follows:

"When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the satute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

In the case of Ettor v. Tacoma, 228 U. S. 148, the State of Washington passed a statute giving to abutting property owners compensation for consequential damages growing out of an original street grading made under municipal direction. After the plaintiff's damage had occurred, a law was passed repealing such legislation. The Supreme Court, though conceding that the damages which the plaintiff had sustained were "consequential" damages, and that in the absence of statute there was no liability for such damages, nevertheless held that the repealing act deprived plaintiff of a right which had vested and which, having vested, was a property right which could not be defeated by subsequent legislation; and the Court said: "The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law."

In the recent case of Coombes v. Getz, 285 U. S. 434, the Court held that a director's liability, created by a statute, could not be avoided by legislation repealing the statute subsequent to the loss. Mr. Justice Sutherland said:

"His cause of action was not purely statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor * * * Ettor v. Tacoma, 228 U. S. 148, 156; Pritchard v. Norton, 106 U. S. 124, 132 * * * to enforce his cause of action upon the contract."

These cases, and those cite din the opinion to sustain them, establish the rule that vested rights cannot be destroyed, divested, or impaired by direct legislation.—But while this is true, it is also true that the rule has no application in the case of congressional gratuities or things of that nature, such as bounties or pensions, for they involve no agreement of parties, and the grant of them creates no vested right. And so it has been said that benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. Lynch v. United States, 292 U. S. 571, 577.

Do the rights claimed here rest on any firmer base?

Undoaubtedly the rule to which we first referred applies to contracts of the United States, for as Mr. Justice Brandeis states in

Lynch v. United States, valid contracts are property, whether the obligor be a private individual, a municipality, a State, or the United States, and the Fifth Amendment protects such con-
20 tracts. The only difference between contracts of the sovereign and contracts of the individual, in such circumstances, is that in the case of the sovereign "they onfer no right of action independent of the sovereign will"; and hence no suit may be brought upon them except by consent of the sovereign. But if we are right in thinking that consent in this case was given and is not withdrawn, we may lay aside that aspect entirely; and, in this view, consider the exception to the rule we have mentioned, and whether appellant is within its terms.

The exception relates, as pointed out, to rights arising out of congressional bounties or gratuities; and as to all such, as we have seen, "Congress has the right to give, withhold, distribute, or recall, at its discretion." United States v. Teller, 107 U. S. 64, 68. With reference to the rule and the exception, therefore, it may be stated that, as to contracts which are legal obligations of the United States, its rights and duties are governed by the law applicable to contracts between private individuals—Lynch v. United Stafes, supra, p. 579—that equally, as to rights conferred as gratuities, the United States has the right to withdraw them at any time without being answerable for its action. But there is a middle ground between the two. This arises under circumstances like those mentioned in United States v. Realty Company, 163 U. S. 427. That case involved the appropriation of money by Congress to be paid to certain manufacturers and producers of sugar who had complied with the provisions of an Act of Congress. It was admitted that the plaintiff had complied, but payment was refused (page 431) because a subsequent Act prohibited payment, and also because it was contended that the original Act was unconstitutional. The Supreme Court, without deciding whether the appropriation was beyond the power of Congress, held that, even assuming it was, the plaintiff had acquired a claim against the government of "an equitable, moral, or honorary nature"; that the nation, speaking broadly, owed a debt to an individual when his claim grew out of right and justice; when, in other words, it is based upon considerations of a moral or merely honorary nature, and that the power of Congress extended to the payment of such a debt. While little is said in the opinion about the repealing statute which there, as here, directed the Treasury not to pay the claim, it is noticed; and it is a safe assumption that the court would not have held the claim recoverable if the repealing act had been a valid obstacle.

In United States v. Cook, 257 U. S. 528, the Supreme Court permitted an architect to recover compensation in addition to that contracted for and legally recoverable, growing out of delays as the result of the San Francisco earthquake and fire, on the ground that

"there was the moral consideration which properly induced the recognition of an honorable obligation and turned an unenforceable equity into a binding and effective provision." Or, in other words, into a vested right.

Guided and, as we think, controlled by these principles, we turn to the facts in the present case to determine if what occurred here was of such a nature as to amount to the recognition of an honorable obligation, sufficient to turn an unenforceable equity into "a binding and effective provision."

21 Two months before the United States entered the war, and at a time when Germans and Austrians were beginning to transfer their property abroad for fear of its seizure in the event of war, the Secretary of State of the United States issued a statement in which he said the government would, in no circumstances, take advantage of a state of war to take property to which international understanding and the recognized law of the land gave it no just claim or title—that it would scrupulously respect private rights alike of its own citizens and of the subjects of foreign states.

When the Trading with the Enemy Act was under consideration, the committee reported,[10] "Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it."

And when the Settlement of War Claims Act was under consideration, the report of the Committee on Finance of the Senate [11] stated in so many words that Congress not only had refused to exercise the power of confiscation, but "up to the present time * * * has clearly by legislation asserted its policy to be the very contrary of confiscation."

The Act itself substantiates this statement. For instance, it requires the consent of the former owners of the property to the retention of the 20 per centum, and this twenty per centum retention was itself the result of an agreement between American claimants against Germany and the German claimants against the funds in the hands of the Alien Property Custodian.[12] It authorizes the Custodian to withdraw outstanding demands against German property upon payment of the 20%.[13] It requires the payment of taxes to the United States upon the seized property,[14] and it speaks of the former owners as "the persons entitled thereto."[15]

That this policy on the part of Congress is in complete accord with modern thought and the custom and usage of civilized nations, is beyond contradiction. Chief Justice Marshall, in United States v. Percheman, 7 Pet. 50, 86, says that, even in cases of conquest, "the

[10] (Report No. 113, Committee on Commerce, 65th Cong., 1st Session.)
[11] (70th Congress, 1st Session, Report No. 273.)
[12] Subdivision (m) of Sec. 9.
[13] Secs. 29 (a); 29 (b).
[14] Sec. 24.
[15] Sec. 9 (m), and (p); Sec. 25 (e); Sec. 26 (b); Subsec. (d), (g), (j) of Sec. 9.

modern usage of nations, which has become law, would be violated; that sense of justice and of right which is acknowledged and felt by the whole civilized world would be outraged, if private property should be generally confiscated." And John Bassett Moore, in his Digest of International Law, Vol. 7, pages 312-313, says that the correct modern view is that enemy private property ought never to be confiscated and that the exercise of the right is both ancient and barbarous.

We feel no hesitation in saying, therefore, that nothing can be found in our laws or proceedings with relation to the recent war to countenance the view that it was ever the purpose to confiscate to the use of the United States enemy property found in the United States.

22 And we have been referred to no decision of the Supreme Court, and we know of none, in which it was held to the contrary. It is quite true that in a number of cases, notably the Chemical Foundation case, 272 U. S. 1, Henkels v. Sutherland,[16] and Woodson v. Deutsche, etc., supra, the Supreme Court has said that the United States could do what it pleased with the property, but this is no more than the recognition of the right—a right based on might—and does not even imply its application. On the contrary, Mr. Justice Butler in the Woodson case, in discussing the effect of the early statute, says that it suggests confiscation was not effected or intended. The suggestion is even more pronounced in the later statutes. And so Judge Hand said in Commissioner v. Stearns,[17] "the power to confiscate was held in reserve, but it was not exercised and might never be"; and so, also, Judge Cardozo in Techt v. Hughes, 229 N. Y. 222, 224, said—"Title [to seized enemy property], however, would be unchanged, in default of the later exercise by Congress of the power of confiscation * * * now seldom brought into play in the practice of enlightened nations."

It may, therefore, as we think, be safely asserted that our policy throughout was to remove such property from its owners for the period of the war, but with the ultimate purpose and intention of restoring it after the war.

When the United States and Germany entered into a Debt Funding Agreement (1930), this government accepted "the full faith and credit of Germany" in payment of its obligations to the United States. It asked no security and stipulated, as to the seized property in its hands, that it should not be required to release the same other than "as heretofore or hereafter authorized by the Congress of the United States." But it had more than two years theretofore agreed to the return of four-fifths of all in its hands; and from time to time to the passage of Public Resolution Number 53 the release had been consistently carried out in accordance with the Act (Settlement of War Claims Act).

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[16] 271 U. S. 298.
[17] 65 F. (2d) 371; certiorari denied, Oct. 16, 1933.

By the provisions of this Act Congress formally and positively surrendered the rights as captor which it might have asserted against seized enemy property. It placed the United States definitely in the position of trustee for the benefit of former owners. It reserved to itself neither claim nor right nor title to the property. It did more than this. It recognized and put into final effect a policy adopted from the beginning of the war; that is to say, a policy of trusteeship rather than a policy of confiscation.

In this view, it may be granted that the war powers of the United States included the positive right of confiscation; it may be granted also that this right continued even after peace was re-established; and that the right, arising, as it does, out of the war powers of the government, is not affected by the provisions of the Constitution in relation to due process or the taking of property without just compensation.—Yet it cannot, we think, be contended that the seizure of itself and without more transferred ownership and destroyed title. The seizure, of course, transferred control, and the rights of the owner were in abeyance until Congress elected either to confiscate or to return. But having exercised the option, having
23 renounced the power to hold the property, having declared the terms on which it would restore possession, and those terms being complied with by the former owner, we think it must be decided that its war power is exhausted. Certainly this is true of the property actually delivered, and, if true as to that, it seems to us in principle it is also true as to that which was withheld subject only to the condition that the title as against an adverse claimant should be established. In both cases the United States unqualifiedly renounced the exercise of its war power of confiscation and re-established title in the former owner, and it is too late now to have recourse to that power to take back rights which it has by formal act restored.

We are, therefore, of opinion that by the terms of the Act:

First, the United States consented to be sued; and that it never has withdrawn that consent;

Second, that Congress by a constitutional law authorized and directed the return to appellant of 80% of its seized property upon its agreement to accept 80% and to postpone the return of 20%;

Third, that appellant has complied in all respects with the provisions of the Act, and prior to the passage of Public Resolution 53 was duly found to be entitled to the return of the property and money demanded in this suit;

Fourth, that appellant's property was never confiscated by the United States and, therefore, never became the property of the United States in the sense of the public funds of the United States;

Fifth, that the War Claims Act recognizes the beneficial title of appellant to the property; and that Congress had power, in the recognition of this right, to order restoration of the property; and that in such action the element of gratuity was wholly lacking;

Sixth, that the Act restoring the property established a vested right in appellant which is not affected by the subsequent passage of Public Resolution Number 53; and

Seventh, that in any case the Act, in recognizing an "honorable obligation", turned an "unenforceable equity into a binding and effective provision."

Reversed.

A true Copy,
Test:

Clerk of the United States Court of Appeals,
for the District of Columbia.

24 In United States Court of Appeals for the District of Columbia

No. 6471. January Term, 1936

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT

vs.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN AS TREASURER OF THE UNITED STATES

Judgment

February 17, 1936

Appeal from the Supreme Court of the District of Columbia

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel.

On consideration whereof, It is now here ordered, adjudged and decreed by this Court that the decree of the said Supreme Court in this cause be, and the same is hereby, reversed, and that this cause be, and the same is hereby, remanded to the said Supreme Court for further proceedings not inconsistent with the opinion of this Court.

Per Mr. Justice GRONER.

25 *Memorandum*

Motion for Rehearing and Stay of Mandate Filed March 6, 1936.

26 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order staying mandate, etc.

March 9, 1936

On consideration of appellees' motion for a reargument, and a stay of the mandate for thirty days herein, It is ordered by the Court that appellees be allowed to file printed brief within ten days, with leave to appellant to file reply brief therto within five days; and that the mandate be, and it hereby is, stayed for twenty days.

27 *Memorandum*

Motion for Further Stay of Mandate Filed March 27, 1936.

28 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order staying mandate

March 30, 1936

On consideration of the motion for a further stay of the mandate herein for thirty days, It is ordered by the Court that the mandate be, and it hereby is, stayed for twenty additional days.

29 *Memorandum*

Motion for Further Stay of Mandate Filed April 22, 1936.

30 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order denying motion for rehearing, etc.

May 4, 1936

The grounds on which the motion is made include one not brought to the attention of the Court on the previous argument. It is that the rights conferred upon appellant by the Settlement of War Claims were political and are, therefore, not subject to judicial review.

The parties, by leave of Court, filed briefs in support of as well as in opposition to the motion.

On consideration whereof, It is ordered, for the reasons stated in the opinion this day filed, that the Court adheres to its decision

in the case; that the motion for reargument be and it hereby is denied; and that the mandate be and it hereby is stayed for thirty days under Rule 24 pending application for certiorari to the Supreme Court of the United States.

PER CURIAM.

MAY 4, 1936.

31 In United States Court of Appeals for the District of Columbia

No. 6471

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION, APPELLANT

v.

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULLIAN, AS TREASURER OF THE UNITED STATES, APPELLEES

Opinion on motion for rehearing

May 4, 1936

PER CURIAM: The grounds on which the motion is made include one not brought to our attention on the previous argument. It is that the rights conferred upon appellant by the Settlement of War Claim Act were political and are, therefore, not subject to judicial review.

We are sure it is unnecessary to say that we would not wittingly assume any jurisdiction or do any act which directly or indirectly would embarrass the powers of the government in the control of international relations, and the same declaration has been made by the Supreme Court. Mackenzie *v.* Hare, 239 U. S. 299, 311. However, the most meticulous observance of that rule would not justify our refusal to examine the question, when it is raised, precisely as we would examine any other question in the case and if, in our opinion, we find it not well taken, so to declare.

We are now told that appellant's "rights" under the Settlement of War Claims Act are not different from those it would have been granted had the terms of the Settlement of War Claims Act been contained in a treaty negotiated between the United States and Germany; and that it is "horn-book law that such rights as are acquired by an alien pursuant to treaty are political and not proprietary in the sense that any impairment is judicially examinable." Chae Chan Ping *v.* United States, 130 U. S. 581, is cited in support of this proposition. In that case it was said that Congress is invested with plenary power over foreign relations and that its action in reference to political rights is wholly one of foreign policy, international in aspect, and not subject to judicial inquiry or decision. But the facts

which the Court dealt with in that case are so wholly different from those which we have here that, in our opinion, the rule there is inapplicable here.

In the Chae Chan Ping case this government had by treaty with the Chinese Empire agreed that there might be free migration
32 and immigration of the citizens and subjects of the two countries. A Chinese resident in San Francisco returned to China, having in his possession a certificate in terms entitling him to return to the United States. On his return he was held for deportation under an act of Congress approved October 1, 1888. On a petition for habeas corpus he assailed the validity of the act as in violation of existing treaties between the United States and China. When the case reached the Supreme Court, that Court said:

"The power of exclusion of foreigners being an incident of sovereignty belonging to the government of the United States, as a part of those sovereign powers delegated by the Constitution, the right to its exercise at any time when, in the judgment of the government, the interests of the country require it, cannot be granted away or restrained on behalf of any one. The powers of government are delegated in trust to the United States, and are incapable of transfer to any other parties. They cannot be abandoned or surrendered. Nor can their exercise be hampered, when needed for the public good, by any considerations of private interest. The exercise of these public trusts is not the subject of barter or contract. Whatever license, therefore, Chinese laborers may have obtained, previous to the act of October 1, 1888, to return to the United States after their departure, is held at the will of the government, revocable at any time, at its pleasure. * * * If there be any just ground of complaint on the part of China, it must be made to the political department of our government, which is alone competent to act upon the subject. * * *"

This statement by the Court, as will be observed, is confined to the proposition that Congress has at all times a continuing right to change and modify a treaty involving personal rights and that, when it acts in that respect, all questions arising out of its action are political and not subject to judicial review. But there is no such question here; and there the Supreme Court was at pains to point out the difference between rights of a political nature and rights involving property. As to the latter, the Supreme Court said:

"The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, * * *"

The case, as we think, distinctly recognizes that, even under a treaty, property rights may become so vested as to be protected by the Fifth Amendment. Nor do we find anything different in either Taylor v. Morton, 2 Black 481, or Foster v. Neilson, 2 Pet. 253. In the first, the question was in relation to the amount of duties collect-

ible on imports from Russia, and it was argued that because of the treaty between the United States and Russia, no higher rate of duty could be imposed by the United States on importations than was charged by Russia in the case of importations from the United States. In the Supreme Court the case was not considered on its merits, and there is nothing in the opinion which has any relation to the question we are considering. The other case involved the question of title and boundary in a dispute involving a piece of land in Mississippi claimed under a grant from the Spanish crown on the one hand and a grant from the United States on the other. The question turned upon the treaty with France involved in the Louisiana Purchase, and Chief Justice Marshall, referring generally to the subject of such treaties, said:

"* * * when either of the parties engages to perform a particular act, the treaty addresses itself to the political, not the judicial department; and the legislature must execute the contract, before it can become a rule for the court."

33 Without more, therefore, we are constrained to say that we find nothing in this new question which will justify a rehearing.

The other points pressed upon us are largely an elaboration of those that were presented and considered in our decision. Counsel, however, cite Frelinghuysen v. Key, 110 U. S. 63, and Boynton v. Blaine, 139 U. S. 306, as authority to the point that no right vested in appellant under the Settlement of War Claims Act until the property actually physically passed into its possession.

We think neither of these cases is authority to sustain that position. Both involved the same facts. The United States and Mexico had entered into a treaty for the settlement of claims of the citizens of each country against the other and for the appointment of a commission whose decision should be final. An award was made, among others, to two citizens or corporations of the United States and was paid in installments, but before the entire amount of the award had been turned over to the claimants, it was charged by Mexico that the awards had been made on fraudulent testimony; and on this ground the Secretary of State declined to permit the money then in hand to be turned over. Proceedings by mandamus were begun to require payment. The opinion shows that the treaty was exclusively between the two governments; that the claimants were not parties; and that only such claims could be referred to the commission as were approved by the respective governments; and that this government itself undertook the duty of investigating the evidence and presenting the claim. Its good faith was therefore involved. The Court said:

"The United States, when they assumed the responsibility of presenting the claims of their citizens to Mexico for payment, entered into no contract obligations with the claimants to assume their frauds and to collect on their account all that, by their imposition of false

testimony, might be given in the awards of the commission. As between the United States and the claimants, the honesty of the claims is always open to inquiry for the purposes of fair dealing with the government against which, through the United States, a claim has been made."

In the Boynton case the same conclusion, practically, was reached, with the addition that the Supreme Court held that in the payment of the awards the President was vested by the act of Congress with discretionary power and was, therefore, not subject to mandamus.

In both cases the ground of the decision was that the rights claimed arose out of a treaty over which the political department of the government had control and that, as the government was itself the party claimant and responsible for the bona fides of the claims, it would seriously embarrass its international relations and dealings if the Court held claimants entitled to receive the fund in spite of the alleged fraud.

And, as we have said, that is a wholly different situation than the one confronting us. If, as we have decided, the effect of the War Claims Act, when its terms were accepted by appellant, created vested rights in appellant protected by the Constitution, we cannot refuse to declare that fact and to afford relief simply because to do so might embarrass the executive department of the government in the collection of the debts due by Germany to the United States. And in this view we think it is incorrect to say, as counsel say in the brief in support of the motion, that, assuming that vested
34 rights comparable to contract rights, were bestowed upon the appellant, these can be lawfully altered by the Congress in the exercise of a paramount power. We think, on the other hand, that the provision of the Constitution on which we based our conclusion, is the paramount law. And we think there is nothing in Lynch v. United States, 292 U. S. 571, to the contrary.

Appellant, when it filed its consent to the provisions of the War Claims Act and agreed to accept 80% of the amount and value of its seized property and to release 20% to the payment of claims of American citizens against Germany, appeared in the role of an alien friend. Its former status as an alien enemy was changed by the terms of the Treaty of Berlin, and to paraphrase the language used by Chief Justice Hughes in Russian Fleet v. United States, 282 U. S. 481, 491–2, as an alien friend, embraced within the terms of the Fifth Amendment, it cannot be said that its property is subject to confiscation because its government has defaulted in the payment of its debts to the United States. "The provision that private property shall not be taken for public use without just compensation establishes a standard for our Government which the Constitution does not make dependent upon the standards of other governments." Therefore, at the risk of unnecessary repetition, we repeat what we have already said, namely, that we fully recognize

that the war powers of the United States gave them the right to confiscate the property of an enemy found in this country; but we assert, as equally true, that there can be no confiscation of enemy property, in the sense that title is changed and the rights of the original owner destroyed, without an Act of Congress to that effect. The declaration of war is not such an act. It has never been held that a state of war operated of itself and by its own force to accomplish a transfer of the title of property. Brown v. The United States, 8 Cranch, 110.

In the decision which we are asked to review and reconsider, we have shown that from the moment war between the United States and Germany became imminent, through the whole course of the war, and to and until several years after the passage of the Settlement of War Claims Act—indeed to the present moment—Congress not only has not passed any act of confiscation of enemy property, but has consistently and steadfastly declared to the people of the United States and to the world a purpose not to indulge that right. And we have shown, likewise, that the policy originally adopted by Congress, and adhered to throughout, was that which in our times—indeed from the time of the establishment of our government—has been universally recognized by civilized peoples as the policy which morality, humanity, and wisdom demanded. When Congress established the office of alien property custodian, it clothed that official with the power to seize and hold and use, and in his discretion to convert into a different form, property of alien enemies found in the United States; but the power of confiscation it held in abeyance. With the seizure went the declaration that the return would be subject to such conditions as Congress might apply. Several years after the close of the war, and after a formal treaty of peace, Congress named the conditions, and appellant, as is admitted, conformed to those conditions in every respect. By the ordinary rules of contract there was then a meeting of minds, and the rights which
35 appellant asserts in this suit became fixed and vested. To say now, as we are asked to say, that the paramount power—the power to confiscate—which concededly Congress had in the prosecution of the war, but which it never exercised, continued thereafter and indefinitely, because alone of the failure of the physical act of delivery, would be to assert a principle for which we can find no authority anywhere. Construing the treaty with England after the Revolution, Judge Story said of it—"for the treaty itself extinguished the war, and with it, the rights growing out of war." Orr v. Hodgson, 4 Wheat, at p. 462. Certainly there is nothing in Hart v. United States, 118 U. S. 62, to support the right; for that was a case which involved the payment of money out of the treasury of the United States—money of the United States—controlled by that article of the Constitution which provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by

Law;". Here, if we are correct, no money of the United States is involved, and no property to which the United States has ever claimed title. But, on the contrary, the subject-matter here is property which, though subject to confiscation, never was confiscated, and which on the re-establishment of peace between Germany and the United States, was ordered returned if and when the owner thereof consented to the conditions imposed by Congress. Nor is there anything in D. of C. v. Eslin, 183 U. S. 62, to the contrary of the view we have adopted, for that case involved, not as here a property right, but a gratuity as to which Congress could give or withhold as it pleased.

There remains only to consider the question, whether the remedy sought by appellant is proper. It is said by appellees that the bill fails to show that the President declined or refused to order the return of the property and that a showing to this effect is jurisdictional. But as to this, we think that the statutory procedure which Congress provided, and which appellant adopted, is in all material respects shown to have been complied with. Enough appears to show unmistakably that there was a refusal by the President to deliver the property on demand. For these reasons, we adhere to our former decision.

A true copy.

Test:

Clerk of the United States Court of Appeals for the District of Columbia.

36 *Memorandum*

Motion for Further Stay of Mandate Pending Application for certiorari to the Supreme Court of the United States Filed June 6, 1936.

37 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Order staying mandate

June 29, 1936

On consideration of the motion for a stay of the mandate herein, pending application for certiorari to the Supreme Court of the United States, It is ordered by the Court that the motion be, and it hereby is, granted for thirty days under Rule 24.

38 In United States Court of Appeals for the District of Columbia

[Title omitted.]

Designation of record

Filed July 1, 1936

The clerk in the preparation of the transcript of record on petition for certiorari to the Supreme Court of the United States will include the following:

1. Printed record;
2. Minute entry of argument;
3. Opinion;
4. Decree;
5. Memorandum of motion for rehearing and stay of mandate;
6. Memorandum of action on motion for rehearing and stay of mandate;
7. Memorandum of motion for further stay of mandate;
8. Memorandum of action on motion for further stay of mandate;
9. Memorandum of motion for further stay of mandate;
10. Order on motion for rehearing and stay of mandate;
11. Opinion per curiam on motion for rehearing;
12. Memorandum of motion for further stay of mandate pending application for certiorari to Supreme Court of the United States;
13. Memorandum of action on motion for further stay of mandate pending application for certiorari to Supreme Court of the United States;
14. This designation of record;
15. Clerk's certificate.

STANLEY REED,
Solicitor General.

[File endorsement omitted.]

39 [Clerk's certificate to foregoing transcript omitted in printing.]

40 Supreme Court of the United States

Order allowing certiorari

Filed October 12, 1936

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia is granted. And it is further ordered that the duly certified copy of the transcript of

the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(Endorsement on cover:) File No. 40794. District of Columbia, U. S. Court of Appeals. Term No. 254. Homer S. Cummings, Attorney General of the United States, and W. A. Julian, as Treasurer of the United States, petitioners, vs. Deutsche Bank Und Disconto-Gesellschaft. Petition for a writ of certiorari and exhibit thereto. Filed August 3, 1936. Term No. 254 O. T. 1936.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. —

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, PETITIONERS

v.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, A CORPORATION

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

The Solicitor General on behalf of Homer S. Cummings, Attorney General of the United States, as successor in interest to the Alien Property Custodian and W. A. Julian, as Treasurer of the United States, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia in the above case.

OPINIONS BELOW

The memorandum opinion of the Supreme Court of the District of Columbia is not reported (R. 8).

The opinion of the United States Court of Appeals for the District of Columbia, per Groner, J. (R. 13), and the subsequent *per curiam* opinion on motion for rehearing (R. 26) are reported in 83 F. (2d) 554, 562.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia was rendered February 17, 1936. On motion for rehearing a *per curiam* opinion was rendered on May 4, 1936. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE AND TREATY INVOLVED

Public Resolution No. 53, 73rd Congress (c. 851, 48 Stat. 1267, 1268, 1269), provides in part as follows:

> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That so long as Germany is in arrears in any payments of principal or interest, * * * under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues,

> profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved. * * * *Provided, further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution.

The Treaty of Berlin (42 Stat. 1939) incorporated by reference certain provisions of the Treaty of Versailles, including, *inter alia,* paragraph (d) of Article 297, Section IV, Part X and paragraph 3 of the Annex to Section IV, Part X, as follows (reprinted in Senate Document No. 348, 67th Cong. 4th Sess.):

> As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the exceptional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty. * * *

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial, or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

QUESTIONS PRESENTED

1. Whether the District Court of the United States for the District of Columbia, after the enactment of Public Resolution No. 53, 73d Congress, has jurisdiction to entertain a suit by a German corporation to compel the return of enemy property and moneys seized by the United States under

the Trading with the Enemy Act, the President not having removed the restrictions as to German corporations.

2. Whether the provisions of the Treaty of Berlin preclude a corporation organized and existing under the laws of Germany from questioning the validity of Public Resolution No. 53, and the detention of property ordered by that resolution.

3. Whether a German corporation having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property held by the United States under the Trading with the Enemy Act, and if so, whether Public Resolution No. 53 deprives it of such vested property rights without due process of law or takes its property for public use without just compensation, in violation of the Fifth Amendment.

STATEMENT

Under the Trading with the Enemy Act the Alien Property Custodian seized property of a German enemy corporation. (R. 3.) The Deutsche Bank und Disconto-Gesellschaft, the successor of said corporation filed, under the Settlement of War Claims Act of 1928, a notice of claim for the return of 80% of the property so seized, and made application to the President for the return thereof. As delegate of the President, the Alien Property Custodian determined that the claimant was the owner of the property and entitled to its return. (R. 3.) Thereafter, certain third parties brought an attachment proceeding, under the pro-

visions of the Trading with the Enemy Act, in which they claimed rights in this property. (R. 3, 4.) This attachment proceeding was dismissed on May 24, 1934. (R. 4.) On June 27, 1934, the President approved Public Resolution No. 53, which, after reciting Germany's default upon its obligations under the Debt Funding Agreement of 1930, postponed all returns and payments formerly authorized by the Trading with the Enemy Act and by the Settlement of War Claims Act of 1928.

On October 3, 1934, suit was instituted by the Deutsche Bank und Disconto-Gesellschaft, in the Supreme Court of the District of Columbia, against Homer S. Cummings, Attorney General of the United States and W. A. Julian, as Treasurer of the United States, to compel the return of the aforesaid property. (R. 2.) The petitioners filed a motion to dismiss the bill of complaint (R. 7) and this motion was sustained (R. 8). On appeal to the Court of Appeals for the District of Columbia the action of the Supreme Court of the District of Columbia was on February 17, 1936, reversed. On motion for rehearing the Court of Appeals on May 4, 1936, adhered to its prior decision.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that Public Resolution No. 53, 73d Congress, did not withdraw the consent of the United States to be sued by a German corporation

under the Trading with the Enemy Act as amended, for the return of enemy property.

2. In failing to hold that the Deutsche Bank und Disconto-Gesellschaft, as a German corporation, is precluded by the Treaty of Berlin, from questioning the validity of Public Resolution No. 53, and the detention of property directed by that resolution.

3. In holding that the Deutsche Bank und Disconto-Gesellschaft, having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property held by the United States under the Trading with the Enemy Act, and, therefore, that with respect to said corporation, Public Resolution No. 53 is unconstitutional.

4. In reversing the judgment of the Supreme Court of the District of Columbia.

REASONS FOR GRANTING THE WRIT

(1) The Court of Appeals for the District of Columbia has passed upon questions of substance relating to the application of the Constitution, and the construction and application of various treaties and statutes of the United States; questions which, in the particular aspects involved, have not been but should be settled by this Court.

The court below held that Public Resolution No. 53 did not remove its jurisdiction to entertain a suit by a German corporation for the return of property seized under the Trading with the Enemy

Act. This conclusion was reached despite the fact that Public Resolution No. 53 provided that "all payments * * * authorized or directed to be made under the Trading with the Enemy Act * * * *whether or not a judgment or decree has been entered with respect thereto,* shall be postponed and the money or property * * * reserved." That this enactment destroyed the lower court's jurisdiction to entertain the suit is a proposition that seems to follow from a consideration of this Court's opinion in *District of Columbia* v. *Eslin,* 183 U. S. 62, 64, 65, wherein it was said:

> The present cases were brought under the act of 1895, and were determined with reference to its provisions. In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, *and the express prohibition of the payment of judgments theretofore rendered,* any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the

> process of any court to make such payment in violation of the act of 1897. * * * It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. [Italics supplied.]

See also *Hart* v. *United States,* 118 U. S. 62.

The Court of Appeals also held that the Congress in 1934 was without the constitutional power to retain and to withhold from German claimants property which had been lawfully seized under the Trading with the Enemy Act and which still remained in the possession of the United States; that the war power of Congress with respect to such property was exhausted after the enactment of the Settlement of War Claims Act of 1928. This Court has had frequent occasion to examine the Trading with the Enemy Act, as amended, and has always indicated that Congress retained dominion over all enemy property. See *United States* v. *Chemical Foundation,* 272 U. S. 1; *Woodson* v. *Deutsche Gold, etc., Vormals,* 292 U. S. 449. The opportunity which Congress afforded former enemies to assert an interest in seized property was more in the nature of a privilege than a right. But whether a right or a privilege it was created and conferred by Congress and continued only by its grace. See *Kogler* v. *Miller,* 288 Fed. 806 (C. C. A. 3rd).

The argument of the lower court that *United States* v. *Realty Co.*, 163 U. S. 427, was a precedent for payment of money, after repeal of authority to pay, is erroneous. A new Act was passed authorizing payment, after the repeal.

It is also to be noted that the court below gave no consideration to the Treaty of Berlin and the provisions of the Treaty of Versailles, incorporated therein. An examination of these treaties indicates that German Nationals were thereby precluded from challenging measures theretofore or thereafter enacted by Congress with regard to property seized under the Trading with the Enemy Act. It is submitted that Public Resolution 53 falls within the scope and terms of these treaty provisions; and therefore the suit herein is directly affected by these treaties. Cf. *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

(2) The decision of the court is based upon certain legal conclusions which are in conflict with the applicable decisions of this and other courts. Thus at the close of the opinion rendered on February 17, 1936, the court in a seriatim statement concluded in part as follows:

> We are, therefore, of the opinion * * * Fifth, that the War Claims Act recognizes the *beneficial title of appellant to the property;* and that Congress had power, in the recognition of this right, to order restoration of the property; *and that in such action*

the element of gratuity was wholly lacking: [Italics supplied.]

Sixth, that the Act restoring the property established a vested right in appellant which is not affected by the subsequent passage of Public Resolution Number 53 * * *

That former enemy owners were divested of every right in respect to property taken and held under the Trading with the Enemy Act, and that the return of this property was purely an act of grace, are principles which, prior to the decision of the Court of Appeals for the District of Columbia, were deemed indisputably established by the decisions of this and other courts: *United States* v. *Chemical Foundation,* 272 U. S. 1; *Woodson* v. *Deutsche, etc., Vormals,* 292 U. S. 449; *Chemische Fabrik Von Heyden* v. *Tait,* 64 F. (2d) 295 (C. C. A. 4th).

In the *Chemical Foundation* case it was said (page 11):

> There is no support for a construction that would restrain the force of the broad language used. Congress was untrammeled and free to authorize the seizure, use or appropriation of such properties without any compensation to the owners . . . And the Act makes no provision for compensation . . . The provision that, after the war, enemy claims shall be settled as Congress shall direct conferred no rights upon such owners.

In the *Woodson* v. *Deutsche, etc., Vormals* case (pages 453 and 454) it was said:

> The Trading with the Enemy Act was passed by Congress in the exertion of the war power; its purpose was to weaken enemies by diminishing the sources from which they could obtain aid, and to strengthen this country by adding to resources for the successful prosecution of the war. Section 12 declares that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct." 40 Stat. 424. While this suggests that confiscation was not effected or intended, it plainly shows that Congress reserved to itself full freedom at any time to dispose of the property as might be deemed expedient and to deal with claimants as it should deem to be in accordance with right and justice, having regard to the conditions and circumstances that might arise during *and after* the war. *It is clear the enemy owners were divested of every right in respect of property taken and held under the Act. United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11. [Italics supplied.]

In *Chemische Fabrik Von Heyden* v. *Tait,* 64 F. (2d) 295, 296 (C. C. A. 4th), the court quoted with approval the language of the lower court as follows:

> In the view I take of the matter the dominant and controlling consideration is that

> *the "Settlement of War Claims Act" was an act of grace* of the sovereign United States, and in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact. The property could have been withheld entirely or confiscated beyond any legal right or remedy of the plaintiff. [Italics supplied.]

(3) The lower court recognized the importance of the matter at bar and stated in a brief one-sentence paragraph: "The question is of great importance." This importance lies not only in the fact that the future administration by the United States of property seized and held under the Trading with the Enemy Act will be controlled, in large measure, by the decision in this case, but also because the case involves questions affecting the power of Congress to act with respect to international relations and inter-governmental obligations.

Wherefore, it is respectfully submitted that this petition should be granted.

STANLEY REED,
Solicitor General.

JULY 1936.

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 254

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, PETITIONERS

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The memorandum opinion of the District Court for the District of Columbia (R. 5) is not reported. The opinion of the United States Court of Appeals for the District of Columbia (R. 8) and the subsequent opinion on motion for rehearing (R. 21) are reported in 83 F. (2d) 554, 562.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia was rendered February 17, 1936 (R. 8). On motion for rehearing a *per curiam* opinion was rendered on May 4, 1936 (R. 21). The petition for writ of certiorari was filed August 3, 1936, and was granted October 12, 1936. The jurisdiction of this Court rests upon the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTES AND TREATIES INVOLVED

The statutes and treaties involved are set forth in the Appendix, *infra*, pp. 51–112.

QUESTIONS PRESENTED

1. Whether the courts below, after the enactment of Public Resolution 53, have jurisdiction to entertain a suit by a German corporation to compel the return of enemy property and money seized under the Trading with the Enemy Act.

2. Whether the provisions of the Treaty of Berlin preclude a German corporation from questioning the validity of Public Resolution 53.

3. Whether, as applied to respondent, Public Resolution 53 is in violation of the Fifth Amendment to the Constitution.

STATEMENT

The facts as stated in the bill of complaint (R 1–4) may be summarized as follows:

Pursuant to the Trading with the Enemy Act the Alien Property Custodian seized the property in the United States of the Direction der Disconto Gesellschaft, which he had determined to be an alien enemy (R. 2). The property so seized was held by the Custodian, or deposited by him in the Treasury of the United States. Later, the property was transferred to a single account known as Trust No. 49851. (R. 2.)

About the year 1929 the Deutsche Bank and the Direction der Disconto Gesellschaft, both of which were German banking corporations, consolidated into a single corporation, the Deutsche Bank und Disconto Gesellschaft. The assets of the Direction der Disconto Gesellschaft thereupon became the assets of the Deutsche Bank und Disconto Gesellschaft, the respondent. (R. 1.)

Some time prior to February 16, 1933 (R. 2), respondent and/or its predecessor duly filed a notice of claim with the Alien Property Custodian for the property so taken, and made application to the President of the United States for its return. Prior to the commencement of this action the Alien Property Custodian determined that respondent's predecessor was the owner of said property at the time of seizure, and that respondent was entitled to its return. (R. 2.)

However, on March 16, 1931, one William H. Sprunt and others brought an attachment proceeding pursuant to the Trading with the Enemy Act, and the return of the property was thereby with-

held. On May 24, 1934, that action was discontinued. (R. 2.) Respondent thereupon demanded the return of the property from the Alien Property Custodian, but was refused.

On July 1, 1934, pursuant to executive order, the office of the Alien Property Custodian was abolished, and all its authority, rights, and duties transferred to the Attorney General, one of the petitioners herein. Respondent demanded the return of the property from petitioners, but the demand was refused pursuant to Public Resolution 53, which had been approved on June 27, 1934 (R. 3).

On October 3, 1934 (R. 1.), the respondent instituted the present action, praying that a decree be entered directing the return of cash in the amount of $541,041.44 and of certain stocks and bonds (R. 4). Petitioners filed a motion to dismiss (R. 4), which was granted by the District Court for the District of Columbia on March 12, 1935 (R. 5). On appeal to the Court of Appeals the judgment was reversed on February 17, 1936 (R. 19). On motion for rehearing the Court of Appeals adhered to its original position (R. 21–26).

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals for the District of Columbia erred:

1. In holding that Public Resolution No. 53 did not withdraw the jurisdiction of the District Court for the District of Columbia to entertain a suit against the United States brought by a German

corporation to compel the return of enemy property seized and held under the Trading with the Enemy Act.

2. In holding that the Deutsche Bank und Disconto Gesellschaft, having filed a claim under the Settlement of War Claims Act of 1928, acquired vested property rights in property seized and held by the United States under the Trading with the Enemy Act, and, therefore, that with respect to said corporation, Public Resolution No. 53 is unconstitutional.

3. In failing to hold that the Deutsche Bank und Disconto Gesellschaft, as a German corporation, is precluded by the Treaty of Berlin from questioning the validity of Public Resolution No. 53 and the detention of property directed by that resolution.

4. In reversing the judgment of the District Court of the District of Columbia.

SUMMARY OF ARGUMENT

I

The present action is beyond the jurisdiction of the courts below, for the reason that Public Resolution 53 has prohibited payment to respondent of either the money or property in controversy. Consequently, any decree in the present suit would be without legal effect, and, for that reason, beyond the power of courts exercising true judicial power. *District of Columbia* v. *Eslin*, 183 U. S. 62. The

decision of the lower court to the contrary, based upon the proposition that the prohibition of payment was ineffective, is unsound, for plenary power to control the disposition of both the money and the property which are involved in the present case is in Congress.

In any event, Public Resolution 53 should be construed as a withdrawal of the consent of the United States to the entry of a mandatory decree such as that sought here. That consent was granted by the authorization of these officials to pay in response to a decree; removal of the authorization withdraws the consent. *Louisiana* v. *Jumel,* 107 U. S. 711, 727. Unless the resolution be so construed, Congress would have been consenting to a suit on the one hand and at the same time rendering it ineffective for all practical purposes. The language of the resolution bears out this construction. *Lynch* v. *United States;* 292 U. S. 571.

Even if jurisdiction exists despite the resolution, and even if the consent of the United States to be sued has not been withdrawn, nevertheless this suit is not permissible under the consent which was granted by the Trading with the Enemy Act, Section 9. Under that section suits are permitted only when a question of right, title, and interest to the property seized is in dispute. Here no such dispute exists and the suit may not, therefore, be maintained.

II

Assuming that the present action is within the jurisdiction of the courts below, nevertheless respondent has no standing to question the validity of the Resolution. By the Treaty of Berlin Germany has expressly consented to and confirmed all measures of detention which the United States may see fit to enact. Consequently, respondent, a German national which may complain of acts of the United States only through its sovereign (*United States* v. *Dickelman*, 92 U. S. 520) cannot now question the validity of the Resolution. See *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

III

Assuming that jurisdiction exists, and that respondent has a standing to question the validity of the Resolution, nevertheless, we submit that the Resolution, as applied to respondent, does not violate the Fifth Amendment.

A. The return of enemy property was a mere gratuity which Congress might at any time revoke or limit. *Lynch* v. *United States*, 292 U. S. 571. This conclusion is not inconsistent with *United States* v. *Cook*, 257 U. S. 523, and *United States* v. *Realty Company*, 163 U. S. 427, for they do not support a principle that an authorization of payment of an honorable or moral obligation creates a vested right which may not be withdrawn. Nor may a vested right be created by employing the

language of trusts. We submit that any gratuity authorized by the Settlement of War Claims Act of 1928, but never completed, should not be made effective and binding by the creation of a trust. In any event, the United States retained a power of revocation. *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449. Nor was a vested right created by the consent of the respondent to the retention of 20 percent of the property, for that consent lacked the elements of legal consideration, since the respondent had no rights which it could have relinquished. Moreover, the Settlement of War Claims Act was not a contractual offer in any sense.

B. Even if respondent acquired some rights to the return of the property, these rights were created subject to the treaties and agreements between the United States and Germany. By these treaties the United States reserved a right to deal with the property as it saw fit. Any rights which respondent has, therefore, are subject to the limitation that the United States might, under these treaties, take some further action. This limitation is particularly applicable in the present case, for this Court has always been very reluctant to recognize alleged rights which will fetter the political department of the government in meeting its responsibilities in the field of international affairs. *Mackenzie* v. *Hare,* 239 U. S. 299, 311.

ARGUMENT

PRELIMINARY STATEMENT

The present action is an attempt to question the validity of Public Resolution 53 (*infra*, p. 51). Before proceeding to a discussion of the issues involved, we believe it will be of material assistance to the Court if a summary statement is given of the background of that Resolution.

By the Trading with the Enemy Act, as amended (*infra*, p. 56), Congress provided that all enemy property should be seized by the Alien Property Custodian (Section 7 (c)), and that upon the termination of the war any claim to recover such property "shall be settled as Congress shall direct." (Section 12.) On July 2, 1921, a Joint Resolution was adopted which terminated the state of war between the United States and Germany (*infra*, p. 63). This resolution reserved to the United States and its nationals all rights which were stipulated for their benefit under the Treaty of Versailles, and declared a policy to make no disposition of sequestered German property until the German government had made suitable provision for the satisfaction of American claims. The Treaty of Berlin (*infra*, p. 67), which was concluded between the United States and Germany on August 25, 1921, and proclaimed on November 14, 1921, accorded to the United States all rights and privileges specified in the Resolution of July 2, 1921, and also incorporated all the rights and ad-

vantages stipulated for the benefit of the United States in the Treaty of Versailles. (Articles I, II, *infra*, p. 71.) By the Treaty of Versailles it was provided that property of German nationals which had been seized might be constituted as a pledge for enemy liabilities (Part X, Section IV, Article 297 (e) (*infra*, p. 75)) and that such property "shall be subject to disposal by such [Allied or Associated] Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto." *Id.*, Article 297 (h) (2) (*infra*, p. 76).) See also Article 297, Annex, par. 4 (*infra*, p. 77). Germany also obligated itself to compensate its nationals for any losses caused by the sale or retention of their property by the Allied or Associated Powers. (Article 297 (i).)

On August 10, 1922, a Mixed Claims Commission was established (*infra*, p. 79) to determine the claims of the United States and its nationals against Germany and to enter awards for the losses for which Germany was responsibile.

Through arrangements made by the Secretary of State with the Allied Governments, there was allocated to the United States under the provisions of the Finance Ministers' Agreement of January 14, 1925, 2¼ percent of all receipts paid by Germany which were available for reparation payments. In 1928, prior to the enactment of the Settlement of War Claims Act, the United States

was receiving approximately $11,000,000 annually from this source.[1] If, however, American claimants had been forced to rely solely upon these payments, approximately 60 years would have been required for payment in full. Some method was necessary by which claimants could obtain a more prompt payment. The Settlement of War Claims Act was the solution.[2]

By the Settlement of War Claims Act Congress authorized the return to German nationals of 80 percent of the aggregate value of property which had been seized.[3] The Act, in addition, created a German Special Deposit Account which was to be made up of the 20 percent retained; all moneys received and to be received from Germany on account of the awards of the Mixed Claims Commission (Section 4 (b)); and was to be further augmented by appropriations of the Congress. From this account the awards of the Mixed Claims Commission were to be paid in an established order of priorities (Section 4 (c)).

In 1930 the Debt Funding Agreement of 1930 (*infra*, p. 83) was entered into between the United

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[1] H. Rep. No. 1924, 73d Cong., 2d Sess., pp. 7–8, reprinted *infra*, pp. 95, 98.

[2] See Senate Rep. No. 273, 70th Cong., 1st Sess., p. 33.

[3] By the Winslow Act (Act of March 4, 1923, c. 285, 42 Stat. 1511) Congress had already authorized the return of property to former German owners up to the value of $10,000.

States and Germany. Under that Agreement provision was made for direct payment by Germany of an annual sum of 40,800,000 reichsmarks ($9,700,000 at the time the agreement was concluded, or about $16,300,000 at the present mint parity of the mark) for a period of 52 years. The total of these payments was equal to the amount that it was estimated would be due on Mixed Claims awards. In 1934, when it became evident that Germany was either unable or unwilling to satisfy its obligations under the Agreement,[4] and the contemplated payments by Germany into the German Special Deposit Account ceased, the Resolution here involved was enacted.[5]

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[4] The German default, in detail, is set forth in H. Rep. No. 1924, 73d Cong., 2d Sess., pp. 7–8: "On March 31, 1934, all of the installments aggregating 102,000,000 reichsmarks, previously postponed since September 30, 1931, together with the semiannual installment of 20,400,000 reichsmarks and semiannual interest of 2,550,000 reichsmarks, or a total of 122,400,000 reichsmarks (about $50,000,000), were due and payable. Germany advised that it could not meet the principal payments falling due, but would and did pay the interest due of 2,550,000 reichsmarks (about $1,000,000)."

[5] Prior to the passage of Public Resolution 53, Germany had enacted stringent regulations controlling foreign exchange which in effect "postponed" all payments to creditors on public and private obligations abroad.

Laws had also been enacted placing the foreign credits and claims payable in foreign exchange of German nationals at the disposition of the Reichsbank for the benefit of the German Government. Relevant provisions of a decree of February 4, 1935, which embodied all previous provisions regarding foreign exchange is set forth in the Appendix, *infra*, p. 110.

I

THE COURTS BELOW ARE WITHOUT JURISDICTION TO ENTERTAIN THE INSTANT SUIT

The Government urged below that the effect of Public Resolution 53 (*infra*, p. 51) was to deprive the courts of jurisdiction to entertain the present action. The District Court sustained the contention, but the Court of Appeals held that it had jurisdiction, and proceeded to declare the Resolution unconstitutional.

Public Resolution No. 53 (c. 851, 48 Stat. 1267) provides, in part, as follows:

> * * * So long as Germany is in arrears in any payments * * * under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: * * *.

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In brief, the resolution prohibits payments to claimants of either money or property during the time that Germany is in default, whether or not a judgment has been entered with respect to the claim.[6]

A. THE PRESENT ACTION IS USELESS FOR EVERY PRACTICAL AND LEGAL PURPOSE AND IS THEREFORE BEYOND THE JURISDICTION OF THE COURTS BELOW

With respect to money which has been deposited in the Treasury of the United States pursuant to Section 12 of the Trading with Enemy Act (*infra*, p. 60), we believe that there can be no serious question as to the power of Congress to enact such a prohibition. Article I, Section 9, clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law;". This Court, in some instances relying upon that clause, and in some instances without referring to it, has frequently decided that no judgment or decree of any court can compel the payment of money from the

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[6] Congress empowered the President to remove the restrictions imposed by Public Resolution 53 in their application to the many classes of claimants who are not German nationals. This the President has done by Executive Order 6981, of March 2, 1935, and Executive Order 7111, of July 22, 1935. The restrictions now effective are those against the return of property to German nationals, restrictions imposed by Congress itself. No question of delegation of power is, therefore, raised in the present case. *Yazoo & Mississippi R. R.* v. *Jackson Vinegar Co.*, 226 U. S. 217, 219–220; *Gorich* v. *Fox*, 274 U. S. 603, 606; *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165, 186.

Treasury unless there has been an authorization by Congress. See *District of Columbia* v. *Eslin*, 183 U. S. 62, 65; *United States* v. *Weld*, 127 U. S. 51, 56; *Hart* v. *United States*, 118 U. S. 62, 66; *Knote* v. *United States*, 95 U. S. 149, 154; *Commonwealth* v. *Boutwell*, 13 Wall. 526; *Reeside* v. *Walker*, 11 How. 271, 291.

The present action seeks to compel the Treasurer of the United States to pay to respondent a certain sum of money which he holds (R. 4). In view of the constitutional provision and the above cases, we believe the action in this respect clearly must fail. But there is a more fundamental objection, which goes to the jurisdiction both of this Court and of the courts below.

Congress, by the Resolution prohibiting payment of any judgment, has effectively destroyed the jurisdiction of any court exercising true judicial power. As has frequently been pointed out, courts in the exercise of such judicial power cannot enter decrees which will be without legal effect. *Hayburn's Case*, 2 Dall. 409; *United States* v. *Ferreira*, 13 How. 40, 46; *Gordon* v. *United States*, 117 U. S. 697, s. c. 2 Wall. 561. Of course, it is not essential in every case that process for execution be available (*Nashville, C. & St. L. Ry.* v. *Wallace*, 288 U. S. 249), but where an action is brought, not to determine the respective interests and rights of parties, but primarily to secure an order directing a public official to make a specific payment, then

it is beyond the jurisdiction of a court exercising judicial power to enter such an order where compliance by that official has been specifically and effectively prohibited by an act of Congress.

An almost direct precedent is furnished by *District of Columbia* v. *Eslin*, 183 U. S. 62. Congress had conferred upon the Court of Claims jurisdiction to pass upon the claims of certain persons against the District of Columbia. Pursuant to the Act, a decision had been rendered in their favor by the Court of Claims, and an appeal taken to this Court. Later Congress passed an Act providing that all proceedings pending under the enabling Act should be vacated, and that no judgment previously rendered in pursuance of said Act should be paid.

This Court held that the appeal must be dismissed for lack of jurisdiction, without any determination of the rights of the parties, because any judgment which it rendered would lack the sanction which attends the exercise of judicial power. Mr. Justice Harlan, speaking for the Court, stated (p. 65):

> In view of the repeal of that act by Congress, the requirement that pending proceedings be vacated, and the express prohibition of the payment of judgments theretofore rendered, any declaration by this court as to the correctness of the final judgment entered by the Court of Claims under the act of 1895 would be useless for every practical or legal purpose, and would not

> be in the exercise of judicial power within the meaning of the Constitution. It was an act of grace upon the part of the United States to provide for the payment by the Secretary of the Treasury of the amount of any final judgment rendered under that act. And when Congress by the act of 1897 directed the Secretary not to pay any judgment based on the act of 1895, that officer could not be compelled by the process of any court to make such payment in violation of the act of 1897. A proceeding against the Secretary having that object in view would, in legal effect, be a suit against the United States; and such a suit could not be entertained by any judicial tribunal without the consent of the Government. It seems therefore clear that a declaration by this court in relation to the matters involved in the present appeal would be simply advisory in its nature, and not in any legal sense a judicial determination of the rights of the parties. * * *

See also *Gordon* v. *United States*, 117 U. S. 697, 702, s. c. 2 Wall. 561; *Hart* v. *United States*, 118 U. S. 62.

The court below avoided this result upon two grounds, neither of which, we submit, is tenable. First, it stated that the constitutional requirement of an appropriation is inapplicable, because it applies only to "money of the United States" (R. 25), and not to money or property to which the United States does not "claim title" (R. 26). No authority is cited to sustain the addition of these qualify-

ing phrases to clause 7 of Section 9 of Article I of the Constitution. No authority which we have been able to find does so, and such a construction seems wholly inconsistent with the plenary power vested in Congress.[7] In any event, it is quite clear from the decisions of this Court that the property which was seized by the Alien Property Custodian is the property of the United States, and the former enemy owners were divested of every right in respect of the property taken. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9–11; *Woodson* v. *Deutsche, etc., Anstalt*, 292 U. S. 449, 453–454.

Second, the court below attempted to distinguish the *Eslin* case, *supra*, on the ground that it involved "not as here a property right, but a gratuity as to which Congress could give or withhold as it pleased." (R. 26.) We believe that fact, even if true, to be wholly immaterial. Whether the claim be for a mere gratuity, a claim for payment of a valid debt, or a claim for money held by the United States in trust, the power of Congress to provide for the disposition of the claim—that is, the *remedy* of the claimant, as distinguished from its *right*—is plenary. In any event, the attempted distinction is

[7] The language of the first part of clause 7 is to be contrasted with that of the second part, which provides that an account of the expenditure of all "*public* moneys" shall be published from time to time [italics supplied]. The use of the word "money" without any qualifying adjective in the first part, therefore, must indicate an intention to vest in Congress a control over *all* money in the Treasury of whatever character.

not supported by the facts, for the United States, having validly acquired all rights in the property seized (*United States* v. *Chemical Foundation, supra*), could have continued to hold it, and, as a matter of fact, any return of any part of the property was more in the nature of a gratuity to the enemy aliens than the payment of the contractual claims of the contractors in the *Eslin* case. See pp. 31–33, *infra*.

We believe that the power of Congress is also plenary with respect to the stocks and bonds which are still in the custody of the Alien Property Custodian, and which respondent seeks to have returned to it *in specie*. (R. 4.) By Article IV, Section 3, clause 2 of the Constitution, Congress is given a broad grant of power over all property constitutionally acquired by the United States. See *Ashwander* v. *Valley Authority*, 297 U. S. 288, 330. The power thus granted is merely a corollary of the power over money in the Treasury, and is, by the terms of the Constitution, equally as broad. There can be, of course, no question that the property here in question was lawfully acquired by the United States. Moreover, it is to be noted that a suit to recover the property so held is undoubtedly a suit against the United States, which can be maintained only after Congress has granted its consent. Practically, therefore, the control by Congress over the *remedy* of the claimant, is plenary. No superior power, we submit, is vested in the courts.

Of course, even assuming that no decree can be rendered which will be effective, Congress might have vested in the courts of the District of Columbia a jurisdiction to render declaratory judgments. See *O'Donoghue* v. *United States*, 289 U. S. 516, 545. Several factors indicate, however, that even on the assumption that Congress intended, by the Resolution, to authorize the court below to function in that capacity, the court did not purport to do so in the instant suit. First, the relief prayed for (R. 4) is a mandatory injunction, not merely a declaration of rights; second, by the terms of the judgment actually entered (R. 19) the court apparently instructed the District Court to enter an order requiring petitioners to turn over the money and property in question; and finally, no occasion exists here for the determination of any right or title of the claimant, for its right, title, and interest, subject only to the paramount rights of the United States, are not in dispute.

We submit, therefore, that, since the court below was without jurisdiction, its decision should be reversed, and the decision of the District Court, dismissing the bill for lack of jurisdiction, should be affirmed. *Smallwood* v. *Gallardo*, 275 U. S. 56, 62; *United States* v. *Huckabee*, 16 Wall. 414, 435–436.

B. PUBLIC RESOLUTION 53 WITHDREW THE CONSENT OF THE UNITED STATES TO THE MAINTENANCE OF THE PRESENT ACTION

Assuming, *arguendo*, that the prohibition of payment does not deprive the courts below of jurisdic-

tion by eliminating an essential factor in the exercise of true judicial power, we submit that in any event the Resolution should be interpreted as a withdrawal of the consent of the United States to be sued—at least to the extent that consent to the entry of a mandatory decree, as prayed herein, has been withdrawn. There can be no doubt, of course, that a suit under the Trading with the Enemy Act is a suit against the United States (*Becker Co.* v. *Cummings,* 296 U. S. 74), or that the United States cannot be sued without its consent (*Perry* v. *United States,* 294 U. S. 330; *Kawananakoa* v. *Polyblank,* 205 U. S. 349). Nor can there be doubt as to the power of Congress to withdraw that consent, once given (*Lynch* v. *United States,* 292 U. S. 571, 581–582). We believe that the Resolution did, in fact, withdraw consent to the maintenance of the present suit.

Under the Trading with the Enemy Act, as amended, a decree directing the Alien Property Custodian or Treasurer of the United States to return property lawfully held by the United States was admittedly a suit against the United States, but proper because Congress had authorized these officials to make the return (Section 12, *infra,* pp. 60, 62). That authorization has been removed by the Resolution, and, it having been withdrawn, it must follow that there is now no basis upon which to rest such consent, and the jurisdiction of the courts to enter such a decree against the United States has

ceased to exist. *Louisiana* v. *Jumel*, 107 U. S. 711, 727.

That Congress must have intended to withdraw its consent to the entry of mandatory decrees against petitioners is made clearly evident by the fact that a contrary intent would have created a completely anomalous situation. Even assuming that the prohibition of payment is beyond the power of Congress, nevertheless that body must have believed that it possessed the power to enact an effective prohibition, and it cannot reasonably be supposed that it would intend to permit the maintenance of a suit to secure an order against these officers directing the return of property and at the same time order its officers not to comply with that order.

That consent has been withdrawn is further evidenced by the language employed: payments shall be postponed "whether or not a judgment or decree has been entered with respect thereto." No mention is made of judgments which might thereafter be rendered, indicating again that Congress intended by the Resolution to remove any jurisdiction to render such judgments thereafter. The opposite situation in *Lynch* v. *United States*, 292 U. S. 571, led this Court to conclude that Congress had not intended to remove the right to sue. See 292 U. S. at p. 585.

"C. IN ANY EVENT, THE CONSENT TO SUE WHICH IS GIVEN BY SECTION 9 OF THE TRADING WITH THE ENEMY ACT DOES NOT ALLOW THE PRESENT SUIT

If jurisdiction exists despite the Resolution, and if the consent of the United States to be sued has not been withdrawn, there still remains the question whether the present suit is permissible under the consent which has been granted. That consent was given by the Trading with the Enemy Act, Section 9, as amended (*infra*, pp. 57, 58), and authorizes a claimant to—

> * * * institute a suit in equity in the Supreme Court of the District of Columbia * * * *to establish the interest, right, title, or debt so claimed,* and if so established the court shall order the payment * * *. [Italics supplied.]

The instant suit is not, however, a suit to establish an interest, right, or title within the meaning of the Act, for all questions of ownership at the time of seizure have already been determined (R. 2), and are not in issue here. The process of the courts is invoked solely to secure an order directing certain public officials to make a payment which they refuse to make at the present time because of specific instructions from Congress.

The Trading with the Enemy Act, however, apparently intended to allow a suit to be instituted only where it was necessary for the claimant to establish its right, title, and interest; that is, judicial

determination was provided when a question of ownership was in issue. See *Pilger* v. *Sutherland,* 57 F. (2d) 604, 606 (App. D. C.). Consequently, since the consent of the sovereign to be sued is a matter of grace only, and must be construed strictly against the one attempting to avail himself of the privilege (*Eastern Transportation Co.* v. *United States,* 272 U. S. 675, 686) it is submitted that the present suit may not be maintained.

II

RESPONDENT IS PRECLUDED BY THE TREATY OF BERLIN FROM QUESTIONING THE VALIDITY OF PUBLIC RESOLUTION 53

Assuming, *arguendo,* that the present action is within the jurisdiction of the courts below, we believe that respondent, a German corporation (R. 1), which, so far as the record reveals, does not even do business in the United States, is not in a position to question the validity of Public Resolution 53.

This Court, in *United States* v. *Dickelman,* 92 U. S. 520, stated the principle applicable to claims by a citizen of one sovereign against another sovereign (p. 524):

> One nation treats with the citizens of another only through their government. A sovereign cannot be sued in his own courts without his consent. His own dignity, as well as the dignity of the nation he represents, prevents his appearance to answer a

> suit against him in the courts of another sovereignty, except in performance of his obligations, by treaty or otherwise, voluntarily assumed. Hence, a citizen of one nation wronged by the conduct of another nation must seek redress through his own government. His sovereign must assume the responsibility of presenting his claim, or it need not be considered. If this responsibility is assumed, the claim may be prosecuted as one nation proceeds against another, not by suit in the courts, as of right, but by diplomacy, or, if need be, by war. * * * For all the purposes of its decision, the [instant] case is to be treated as one in which the government of Prussia is seeking to enforce the rights of one of its citizens against the United States in a suit at law, which the two governments have agreed might be instituted for that purpose. * * *

See also *Ware* v. *Hylton*, 3 Dall. 199, 230; *Frelinghuysen* v. *Key*, 110 U. S. 63, 71; *Chae Chan Ping* v. *United States*, 130 U. S. 581, 601, 609; *United States* v. *Chemical Foundation*, 272 U. S. 1, 11.

In the *Dickelman* case, the claimant, a Prussian citizen, was allowed to sue in the Court of Claims as a result of a special statute, growing out of diplomatic negotiation between Prussia and the United States. In the instant case, we submit that Resolution 53 has been authorized by, and is in fact based upon, treaties and agreements between the United States and Germany, and therefore respondent, as a German national who is bound by

these treaties and agreements, has no standing to question the validity of the Resolution.

The Treaty of Berlin was concluded between the United States and Germany on August 25, 1921, and proclaimed on November 14, 1921 (*infra*, pp. 67–73). That treaty, by Sections I and II, expressly reserved for the benefit of the United States all the beneficial provisions of the Treaty of Versailles. The Treaty of Versailles,[8] by paragraph (d) of Article 297, Section IV, Part X, provides as follows:

> As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, *all the exceptional war measures*, or measures of transfer, or *acts done or to be done* in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto *shall be considered as final and binding upon all persons* except as regards the reservations laid down in the present Treaty. [Italics supplied.]

Paragraph 3 of the Annex to Section IV, Part X, which defines the terms "exceptional war measures" and "acts in execution of these measures" reads as follows:

> In Article 297 and this Annex the expression "exceptional war measures" includes

[8] Reprinted in Senate Document No. 348, 67th Cong., 4th Sess., pp. 3329–3522. Portions referred to herein are set out in full in the Appendix, pp. 74–78, *infra*.

> measures of all kinds, legislative, administrative, judicial, or others, that have been taken or *will be taken hereafter* with regard to enemy property, and *which have had or will have the effect of removing from the proprietors the power of disposition over their property,* though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form, or in whatsoever place. *Acts in the execution of these measures include all detentions,* instructions, orders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges, or expenses, or the collecting of fees. [Italics supplied.]

In brief, the treaties of Berlin and Versailles, taken together, confirm all actions that were taken *or would thereafter be taken,* by Congress in dealing with seized property. Since measures of "detention" are specifically allowed, the action taken

by Congress in Public Resolution 53 [9] is expressly sanctioned by the two governments.

Petitioners are advised by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties. Nor has the German Government suggested that the Treaty of Berlin does not contain plenary authority for such action by the United States. This construction of the treaty by the political departments of the parties to it indicates that this Resolution cannot be considered as inconsistent with it.[10]

Respondent, a German national, is bound by the treaties of its sovereign. *Ware* v. *Hylton*, 3 Dall. 199; *Mairano* v. *Baltimore & Ohio R. R. Co.*, 213 U. S. 268; *Klein* v. *Palmer*, 18 F. (2d) 932 (C. C. A. 2d). We do not urge that these treaties deprive respondent of the privilege of resorting to our courts for the protection of its interests in appro-

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[9] The Resolution is, specifically, a measure of detention, not confiscation, for Congress has directed that the return of respondent's property be "postponed." Interest is accruing on the invested funds and current income is being collected on the securities, all of which will be paid to the respondent when the German Government resumes payment under the Debt Funding Agreement. (Section 23.) Moreover, it should be noted that to the extent that respondent suffers any loss by the postponement of payment, Germany has obligated herself to compensate the respondent. Part X, Sec. IV, Art. 297, par. (i), *infra*, p. 76.

[10] See Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, p. 72; Edwin D. Dickinson, Note, in American Journal of International Law, Vol. 19, p. 161 (1925).

priate cases. Nevertheless, we do urge that the treaties have foreclosed, for this respondent, any question as to the validity of Resolution 53. By instituting the present suit respondent has placed itself in the anomalous position of attempting to question the validity of an act of the United States which may, if unlawful, be redressed only through its sovereign, when that sovereign does not claim that any wrong has been done. In other cases in which the validity of certain transfers of enemy property by the Alien Property Custodian were questioned, the courts have held that aliens are bound by the provisions of the Treaty of Berlin and cannot, therefore, complain of the action taken. *Klein* v. *Palmer,* 18 F. (2d) 932 (C. C. A. 2d); *Munich Reinsurance Co.* v. *First Reinsurance Co.,* 6 F. (2d) 742 (C. C. A. 2d), appeal dismissed, 273 U. S. 666; *Lange* v. *Wingrave,* 295 Fed. 565 (E. D. La.). See also *United States* v. *Chemical Foundation,* 272 U. S. 1, 11. We submit that a similar result should be reached in the present case.

III

PUBLIC RESOLUTION 53 IS CONSTITUTIONAL

Assuming, *arguendo,* that the courts have jurisdiction of the present action, and that the respondent has a standing to question the retention of property ordered by the Resolution, we come to the constitutional issue: does Public Resolution 53, as applied to this respondent, conflict with the Fifth Amendment to the Constitution?

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Respondent does not question the power of Congress to enact this Resolution insofar as it does not interfere with vested rights. Indeed, authority to enact it may be found in any one of a number of powers expressly granted to Congress. The Trading with the Enemy Act, as originally enacted, or as amended, finds its sanction in the war power in Article I, Section 8, clause 11, of the Constitution, which empowers Congress "to declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water." *Stoehr* v. *Wallace,* 255 U. S. 239; cf. *Commercial Trust Co.* v. *Miller,* 262 U. S. 51. Similarly, Public Resolution 53 may be so justified. Further, it may be considered as a measure necessary and proper for carrying into execution the provisions of the Treaty of Berlin reserving to the United States a lien on all German property for the benefit of American claimants. Authority to enact the Resolution may likewise be found in the power of Congress to make all needful rules respecting property which the United States has constitutionally ~~re-~~ acquired. Article IV, Section 3, clause 2; *Ashwander* v. *Valley Authority,* 297 U. S. 288, 330. Finally, the legislation may be looked upon as an exertion of the plenary power of Congress over international relations. *Fong Yue Ting* v. *United States,* 149 U. S. 698, 711.

Respondent, however, bases its claim for relief upon the contention that it has acquired, at some time, a right to the return of the property in

question which Congress may not impair. Petitioners believe that two factors are present which make it impossible to sustain that contention. First, the return of enemy property was in the nature of a gratuity, which Congress could, at any time, revoke or limit. Second, any rights acquired by respondent, a German national, were subject to the limitations of the treaties and agreements between the United States and Germany, and action taken pursuant to those treaties and agreements cannot, therefore, impair respondent's rights. These reasons will be discussed below in the order named.

A. THE RETURN OF PROPERTY AUTHORIZED BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928 IS AN ACT OF GRACE, AND THE AUTHORIZATION MAY, THEREFORE, BE WITHDRAWN AT ANY TIME

There can be no doubt that if the return of enemy property was an act of grace, no vested right in such property could have been acquired by respondent. The principle has recently been reiterated in *Lynch* v. *United States*, 292 U. S. 571, 577:

> * * * Pensions, compensation allowances and privileges are gratuities. They involve no agreement of parties; and the grant of them creates no vested right. The benefits conferred by gratuities may be redistributed or withdrawn at any time in the discretion of Congress. *United States* v. *Teller*, 107 U. S. 64, 68; *Frisbie* v. *United States*, 157 U. S. 160, 166; *United States* v. *Cook*, 257 U. S. 523, 527. * * *

See also *In re Hoag,* 227 Fed. 478, 479 (S. D. N. Y.); *In re Goodwin,* 57 F. (2d) 31, 32 (C. C. A. 6th); *Field* v. *Giegengack,* 73 F. (2d) 945, 946 (App. D. C.). The issue, then, is whether the return of property seized by the Alien Property Custodian constitutes such a gratuity.

This Court and the lower Federal courts have frequently stated that upon the seizure of enemy property under the Trading with the Enemy Act the former owners were divested of every right they may have had in it. See *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 453–454; *United States* v. *Chemical Foundation,* 272 U. S. 1, 9–11; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 56; *Crone* v. *Sutherland,* 63 F. (2d) 895, 896 (App. D. C.); *Klein* v. *Palmer,* 18 F. (2d) 932 (C. C. A. 2d). It may be true, as pointed out by the court below (R. 17), that the United States has never intended to "confiscate" the property so seized, in the sense that it has never intended to convert it to its own use. But such an attitude is in no manner inconsistent with a complete power in Congress to deal with the property.

Bearing in mind this complete power of disposition, it becomes evident that it was an act of grace for Congress in the early amendments to the Trading with the Enemy Act,[11] and in the Set-

[11] By the Winslow Act of 1923 (c. 285, 42 Stat. 1511) Congress authorized the President to return up to $10,000 of seized property.

tlement of War Claims Act of 1928, to authorize a partial return of the property. This has been the uniform interpretation of these Acts by the courts. See *United States* v. *White Dental Mfg. Co.*, 274 U. S. 398, 402; *Chemische Fabrik von Heyden* v. *Tait*, 64 F. (2d) 295, 296 (C. C. A. 4th); *Krausz* v. *United States*, 14 F. Supp. 291, 294 (C. Cls.); *Kogler* v. *Miller*, 288 Fed. 806, 808 (C. C. A. 3d). We believe, therefore, that respondent has acquired no vested rights which are subject to the limitations of the Fifth Amendment.

The court below, however, while admitting that no vested rights may be created in a gratuity, and the fact that the United States had, upon seizure, complete control over the property, held that respondent, nevertheless, acquired vested rights beyond the power of Congress to impair. These rights, it felt, were created by the Settlement of War Claims Act, upon one, or all, of three different theories. We submit that each of the theories is untenable.

The first ground upon which the opinion below is based is that under certain circumstances mere moral or honorable obligations may, by recognition, become binding, or, in other words, create vested rights (R. 15–16). After examining the moral obligation of the United States to return the property here in question, the court concluded that the Settlement of War Claims Act did have that effect (R. 19).

The authorities cited to sustain this conclusion are *United States* v. *Cook*, 257 U. S. 523, and *United States* v. *Realty Co.*, 163 U. S. 427. Neither one, we submit, is precedent for the principle that an authorization of payment of an "honorable" or "moral" obligation is different from an authorization of payment of any other gratuity, which, of course, may be withdrawn at any time. *Lynch* v. *United States, supra.*

In *United States* v. *Cook, supra,* the plaintiffs, as architects, had made the plans and supervised the construction of a Government building in San Francisco. Their compensation was to be five percent of "the actual cost of the work." Because the work was delayed and the cost of labor and materials increased by the San Francisco earthquake and fire, Congress authorized the Secretary of the Treasury to make good to the building contractor his loss from the delay and enhanced prices so that he should receive enough to recoup him for his outlay, but without profit. The architects claimed that "actual cost" included the extra amount paid by the Secretary of the Treasury, and, when their claim was denied, brought an action in the Court of Claims. This Court sustained their contention that the "actual cost of the work" was not limited to the original contract price. The decision was simply a construction of the architects' contract. It does not even bear upon, let alone affirmatively treat of, the question whether Congress may repeal

an act of grace which recognizes an "honorable obligation."

In *United States* v. *Realty Company, supra,* it appeared that Congress, by an Act of 1890, had authorized the payment of a bounty to the producers and manufacturers of sugar. In reliance upon this Act many persons had incurred expenses or made financial commitments. In 1894 the Act of 1890 was repealed. In 1895, Congress nevertheless appropriated moneys to pay claimants who had complied under the original Act of 1890. The Treasurer of the United States, however, refused to pay the claimants who had fully complied, on the ground that the Act of 1895 was unconstitutional. This Court held that "There was enough in the case as presented to Congress upon which to base the assertion that there was a moral and honorable claim upon the public treasury which that body had the constitutional right to recognize and pay" (page 440).

The sole question before the Court was the power of the Congress, by the Act of 1895, to recognize the claims as "debts" payable by the United States through appropriations under Article I, Section 8 of the Constitution. It is difficult to understand how the lower court could conclude from a case upholding the power of Congress to authorize a gratuitous payment, that Congress did not have the corollary power to direct that the payment of gratuities be postponed.

Indeed, in *Work* v. *Rives,* 267 U. S. 175, 181, 182, this Court apparently indicated that no limitation on the plenary power of Congress over gratuities was to be implied from the fact that the gratuity was based on equitable and moral considerations. Moreover, quite apart from authority, the distinction drawn by the lower court between gratuities which recognize "honorable obligations" and other types of gratuities presents many practical and logical difficulties. When is a gratuity the recognition of an honorable obligation and when is it not? Why is the payment of a pension any less a recognition of an "honorable obligation" than the payment of extra compensation to a contractor? What reason is there for creating this arbitrary line of cleavage? An attempt to answer these questions must indicate the confusion which such a distinction would create.

The second ground upon which the lower court rested its conclusion that vested rights had been created is that the Settlement of War Claims Act "placed the United States definitely in the position of trustee for the benefit of the former owners" (R. 18). It is often extremely misleading, of course, in questions dealing largely with public law, to couch an argument in private law concepts.[12] Aside from that factor, however, we submit that no trust could have been created.

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[12] See *United States ex rel. Angarica* v. *Bayard*, 4 Mackay 310, 322 (App. D. C.), aff'd, 127 U. S. 251.

The return of enemy property was, as we have shown, an act of grace. The Settlement of War Claims Act informed former owners that the United States was willing to transfer to them a portion of the property which it had seized and to which it held title. The Act in itself did not consummate the transfer; it merely authorized its consummation, just as a pension statute does not of itself pay the pension but merely authorizes its payment. Until enemy property is actually physically returned to the former owner, and until a pension is physically paid, the particular gratuity is not completed. Cf. *Frelinghuysen* v. *Key,* 110 U. S. 63, 73; *Boynton* v. *Blaine,* 139 U. S. 306, 325. In the case at bar the payment to the respondent which was authorized by the Settlement of War Claims Act was never made. To circumvent this fact by constructing a trust in favor of the respondent is to create legal incidents not contemplated by the Settlement of War Claims Act. It is a well established principle that an ineffective gift is not to be upheld as a declaration of trust. American Law Institute, Restatement of the Law of Trusts, Sec. 31, Comment (a) and (b). We submit, therefore, that the court below was in error in concluding that a trust had been created.

Moreover, assuming that Congress did, by the Settlement of War Claims Act, create a trust, we submit that Congress retained the power to revoke it. Neither the Trading with the Enemy Act nor

the Settlement of War Claims Act contains any direct or apt language creating the "trust" recognized in the lower court. In order to reach its conclusion the court simply referred to the policy of the United States not to appropriate enemy property to its own use, and stated that the Settlement of War Claims Act "recognized and put into final effect a policy adopted from the beginning of the war; that is to say, a policy of trusteeship rather than a policy of confiscation" (R. 18). That assumption, however, completely ignores the fact that there also exists a long-established policy of the United States to protect the interests of Americans who have claims against Germany, and to utilize the property seized either as satisfaction of American claims or as collateral to insure their ultimate repayment (see pp. 9–12, *supra.*). This policy was formally declared and established in the Peace Resolution of 1921, and repeated in the Treaty of Berlin. It is a policy that by its very nature is of more importance than any policy with respect to the ultimate claims of former enemies. If the policy of non-confiscation was sufficient to create a trust, the coexistent policy of protecting American claimants should likewise compel the conclusion that Congress has retained the power to revoke it, at least in the event of a German default.

In *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, this Court determined that in 1934 it was within the power of Congress to direct that the expenses incurred in the seizure and subsequent

administration of enemy property should be charged against it. The Court said (page 454):

> The original Act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.

Likewise, it may be said that the Settlement of War Claims Act coupled with the Peace Resolution, the Treaty of Berlin, and the Trading with the Enemy Act in its earlier forms, plainly disclosed a reservation to Congress, in the event of a default by Germany, of a power to direct that enemy property should be retained.

The third ground upon which the court below based its conclusion that notwithstanding the original gratuitous nature of the return of enemy property vested rights had been created in respondent is that such rights were created when respondent complied with the terms of the Settlement of War Claims Act (R. 24). The fact that the respondent "agreed" to accept 80 percent and postpone the return of the 20 percent is stressed as a "meeting of the minds", creating a contract right.

If the complete and unquestioned power of Congress to retain all the property seized be borne in mind, it is clear that no contract such as that envisaged by the court could have come into existence.

The Settlement of War Claims Act was not a contractual offer, in any sense of the word; it merely authorized the repayment of 80 percent of the property then held by the United States. *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 452. True, as a condition precedent to that return by the President or by a court, Congress required, for reasons which it deemed sufficient, that the former owners file a formal consent to the retention of the 20 percent. This consent could have been dispensed with. To assume that it can serve as consideration for a contract is to ignore completely the fact that respondent had no right to the return of the property which it could relinquish by such a consent. See *Choate* v. *Trapp,* 224 U. S. 665, 674–675. The respondent had been effectively divested of its rights and had none to relinquish. *United States* v. *Chemical Foundation,* 272 U. S. 1, 11; *Woodson* v. *Deutsche, etc., Anstalt,* 292 U. S. 449, 453–454.

We submit, therefore, that the Settlement of War Claims Act, which authorized the return of a portion of the enemy property, was an act of grace merely, and could not, and did not, upon any theory, create any vested rights in the respondent.

B. ANY RIGHTS ACQUIRED BY RESPONDENT, A GERMAN NATIONAL, WERE SUBJECT TO THE LIMITATIONS OF THE TREATIES AND AGREEMENTS BETWEEN THE UNITED STATES AND GERMANY

It is a familiar principle that existing laws are read into contracts in order to fix the terms of the obligation as between the parties. See

Williston, *Contracts,* Vol. 3, Sec. 615 (1936 ed.); *Home Building & Loan Ass'n* v. *Blaisdell,* 290 U. S. 398, 435. Particularly should this be true in dealings between an individual and a sovereign. In other words, if by existing laws a sovereign has specifically reserved a power to act, any contract, and *a fortiori,* a contract which is not express but which is, at most, implied, as in the present case, should be interpreted as reserving that right of action to the sovereign.

In the instant case Congress is accused of violating the terms of a "contract" by a particular course of action. If the right to take that action was, however, reserved by Congress in legislation—including treaties or agreements binding upon the respondent—at the time the alleged contract was made, it is clear, we submit, that the contract has not been broken. Or, to express the thought in a different way, the contract had a "congenital infirmity" (see *Norman* v. *Baltimore & Ohio R. Co.,* 294 U. S. 240, 308)—the fact that Congress might take such action as its laws or treaties then authorized.

In Point II, *supra,* at pp. 26–27, we have already pointed out that certain portions of the Treaty of Versailles, incorporated specifically into the Treaty of Berlin between the United States and Germany, reserved to the United States the power to take all measures with regard to enemy property "which have had or will have the effect of removing from the proprietors the power of disposition over their

property * * *."[13] The same reservation of all powers to deal with this property as it saw fit was incorporated by Congress in Sections 2 and 5 of the Peace Resolution of 1921 (*infra,* pp. 63–64).

In view of this express reservation of power by Congress, respondent, a German national who is bound by the treaties and agreements of its sovereign, cannot now be heard to claim that its alleged contract with the United States is violated by the exercise of the power which Congress had expressly reserved. The contract, if any there be, was created subject to the power of Congress to take action under the treaties.

Looked at from another point of view, it is unlikely that Congress could have intended, by the Settlement of War Claims Act, to forego the exercise of rights which it had theretofore so meticulously preserved. From the end of the War the United States was actively concerned with protecting the rights and claims of its own citizens which arose by reason of acts for which the German Government was responsible. A Mixed Claims Commission had been created to hear them (see *infra,* pp. 79–82) and by provisions of the Treaty of Versailles which were specifically incorporated into the Treaty of Berlin the United States had reserved

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[13] Treaty of Versailles, Annex to Article 297, Section IV, Part X, par. 3. See also Part X, Section IV, Article 297 (b), (h) (2), (e), and the Annex to Article 297, par. 4, all reprinted in the Appendix, *infra,* pp. 74–78.

the right to hold seized property as a pledge for Germany's liability.[14]

As already pointed out (p. 11, *supra*), the Settlement of War Claims Act authorized the 80 percent return to German nationals and made provision for the creation of a German Special Deposit Account, into which was to be paid the retained 20 percent. This German Special Deposit Account, augmented by appropriations of Congress, permitted the acceleration of payments to American nationals on account of the awards of the Mixed Claims Commission. It must be kept in mind that Congress realized that the 20 percent of enemy property to be retained was insufficient as a charge or pledge for complete payment of the awards rendered and to be rendered in favor of American nationals. To contend that Congress, in establishing a procedure for the ultimate return of 80 percent of enemy property, relinquished immediately and forever all of its rights therein, irrespective of what the future might bring, is to contend that Congress deliberately jeopardized the interests of American nationals to that extent. It is obvious, we submit, that the provisions governing the return of 80 percent of German property should not be construed, *ipso facto*, as a waiver of the rights of the United States arising by reason of its being

[14]Article 297 (e), (h) (2), *infra*, pp. 75–76. See also Article 297 (b), *infra*, p. 74.

one of the principal Allied Powers, or under the Treaty of Versailles as incorporated in the Treaty of Berlin, or under the agreement establishing the Mixed Claims Commission—rights which the United States had theretofore so meticulously preserved.

One further fact which should be noted is the reference by the court below to paragraph 4 of the Debt Funding Agreement of 1930 and paragraph (b) of the exchange of notes which accompanied that Agreement. By paragraph 4 the United States agreed "to accept the full faith and credit of Germany as the only security and guarantee for the fulfillment of Germany's obligations" under the Agreement. By clause (b) of the notes it was stipulated that "Nothing contained therein [in the Agreement] shall be construed as requiring the United States to release any German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States." (See *infra*, pp. 83, 87, 90–91). The exact significance to be attributed to these provisions is not made clear by the court below, but the implication is created that the Settlement of War Claims Act was an authorization "heretofore" made within the meaning of paragraph (b) which could not thereafter be changed.[15]

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[15] Wholly apart from the reservation contained in the notes, the "security" clause of the Debt Funding Agreement (par. 4) has no application here. The clause was merely a reiteration of the established policy of the United States to

The answer to this contention is apparent when it is noted that clause (b) of the notes referred to authorizations "heretofore *or hereafter*" made. This language, in other words, is consistent with the Congressional policy of retaining complete control over property seized under the Trading with the Enemy Act. Moreover, it must be apparent that the Agreement is no bar to the enactment of the Resolution because of the well-established principle that any treaty or agreement made by the United States with any foreign nation is subject to such acts as Congress may pass for its modification or repeal, particularly where the other nation has neglected to perform its engagements under the treaty or agreement. Cf. *Chae Chan Ping* v. *United States,* 130 U. S. 581, 600, 601; *Whitney* v. *Robertson,* 124 U. S. 190, 195; *Head Money Cases,* 112 U. S. 580, 599.

Finally, petitioners believe that Public Resolution 53 is not a violation of either the due process or just compensation clauses of the Fifth Amendment, for the effect of the Treaty is to reach into and control the application of the Amendment.

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refrain from the use of military sanctions to compel the payment of the financial obligations of Germany. Its effect was, apparently, to write what might be termed a version of the Drago doctrine, or the principle of the Hague Convention of 1907 respecting the limitation of the employment of force in the collection of public debts, into the intergovernmental financial relations of the United States and Germany. See Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Vol. 1, p. 563).

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Even should it be conceded that the mere postponement of payment of a claim against the United States constitutes a "deprivation" of property, it is not a deprivation without due process, for it is specifically authorized by the Treaty of Berlin, and that Treaty as to this respondent constitutes due process of law. Cf. *Tucker* v. *Alexandroff*, 183 U. S. 424 (1902); *Neeley* v. *Henkel*, 180 U. S. 109 (1901); *Ex parte Toscano*, 208 Fed. 938.

Nor does Public Resolution 53 take the respondent's private property for public use without payment of just compensation within the meaning of the Amendment. The German Government speaks for its citizens as to their claims against the United States, even where there is ~~priority~~ PRIVITY of contract between the United States and the German national. Therefore, even if the property has been so taken for public use, the respondent cannot complain because the German Government has obligated itself to pay it the "just compensation" which the respondent asserts is demanded by the amendment, and the German Government had authority to so agree for its national. Paragraph (i) of Article 297, Section IV, Part X of the Treaty of Berlin provides:

> Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights, or interest in Allied or Associated States.

This Court has always been loath to permit the judiciary to take any action which would fetter the political department in meeting its responsibilities in international relations. *Mackenzie* v. *Hare,* 239 U. S. 299, 311; *Burnet* v. *Brooks,* 288 U. S. 378, 396; *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, 57; *Missouri* v. *Holland,* 252 U. S. 416.[16] There can be no doubt that the responsibility of procuring satisfaction by Germany of the claims of American nationals is upon the President and Congress (*Holzendorf* v. *Hay,* 20 App. D. C. 576). A decree ordering the payment to a German national contrary to legislation designed to assist in the settlement of international problems should be entered by this Court only with the greatest reluctance, because this legislation is merely one step in the general plan of dealing with the war debts and war compensations. Cf. *Taylor* v. *Morton,* 2 Curtis, C. C. 454, aff'd, 2 Black 481; *Head Money Cases,* 112 U. S. 580, 598; *Chae Chan Ping* v. *United States,* 130 U. S. 581.

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[16] See also Weston, *Political Questions*, Harvard Law Review, Vol. 38, p. 296, 315–316; Finkelstein, *Judicial Self-Limitation*, Harvard Law Review, Vol. 37, p. 338, 347; Field, *The Doctrine of Political Questions*, Minnesota Law Review, Vol. 8, p. 485; Dickinson, *International Political Questions in the National Courts*, American Journal of International Law, Vol. 19, p. 157.

CONCLUSION

Wherefore, we submit that the decision below should be reversed and the bill dismissed.

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APPENDIX

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APPENDIX

PUBLIC RESOLUTION 53, APPROVED JUNE 27, 1934 (C. 851, 48 STAT. 1267)

TO AMEND THE SETTLEMENT OF WAR CLAIMS ACT OF 1928, AS AMENDED

Whereas the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

"SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said [Government] * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German,

* * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *."

Whereas the treaty between the United States and Germany of August 25, 1921, incorporated said provision of such joint resolution and also provided in article I thereof as follows:

"Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."; and

Whereas by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

Whereas under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000

reichmarks per annum from April 1, 1930, to March 31, 1981; and

Whereas Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has, accordingly, failed to make suitable provision for the satisfaction of the said claims against Germany: Now, therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as

amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review.

Section 36 of the Emergency Farm Mortgage Act of 1933, as amended, is amended—

I. By striking the comma and the word "and" after the words "to reduce and refinance its outstanding indebtedness incurred in connection with any such project" in the second sentence thereof and inserting in place thereof the following: "; or, whether or not it has any such indebtedness, to purchase or otherwise acquire in connection with such project storage reservoirs or dams or sites therefor, or additional water rights, or canals, ditches, or rights-of-way for the conduct of water, or other works or appurtenances necessary for the delivery of water, provided such purchase or acquisition is not intended to bring additional lands into production. Such loans".

II. By adding at the beginning of (5) thereof the following: "in the case of a loan to reduce or refinance its outstanding indebtedness,".

III. By adding at the beginning of (C) thereof the following: "in the case of a loan to reduce or refinance the outstanding indebtedness of an applicant,".

Approved, June 27, 1934.

TRADING WITH THE ENEMY ACT OF 1917 (C. 106, 40 STAT. 411), AS AMENDED BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928 (C. 167, 45 STAT. 254), AND BY OTHER ACTS (U. S. C. A., TITLE 50, APPENDIX)

* * * * *

SEC. 7. (c) If the President shall so require any money or other property including (but not thereby limiting the generality of the above) patents, copyrights, applications therefor, and rights to apply for the same, trade marks, choses in action, and rights and claims of every character and description owing or belonging to or held for, by, on account of, or on behalf of, or for the benefit of, an enemy or ally of enemy not holding a license granted by the President hereunder, which the President after investigation shall determine is so owing or so belongs or is so held, shall be conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or the same may be seized by the Alien Property Custodian; and all property thus acquired shall be held, administered and disposed of as elsewhere provided in this Act.

* * * * *

The sole relief and remedy of any person having any claim to any money or other property heretofore or hereafter conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian, or required so to be, or seized by him shall be that provided by the terms of this Act, and in

the event of sale or other disposition of such property by the Alien Property Custodian, shall be limited to and enforced against the net proceeds received therefrom and held by the Alien Property Custodian or by the Treasurer of the United States.

* * * * * *

SEC. 9. (a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, or to whom any debt may be owing from an enemy or ally of enemy whose property or any part thereof shall have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine said claimant is entitled: *Provided,* That no such order by the President shall bar any person from the prosecution of any suit at law or in equity against the claimant to establish any right, title, or interest which he may have in such money or other prop-

erty. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia or in the district court of the United States for the district in which such claimant resides, or, if a corporation, where it has its principal place of business (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant) to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated.

(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him

hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian, or at the time when it was voluntarily delivered to him or was seized by him, was—

* * * * *

(13) A partnership, association, or other unincorporated body of individuals having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m) has been filed;

* * * * *

Then the President, without any application being made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian:

* * * * *

(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President

for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof.

* * * * *

(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return), as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25.

* * * * *

SEC. 12. That all moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

* * * * *

Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so

direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further,* That the Treasurer of the United States, on order of the alien property custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee.

PUBLIC RESOLUTION NO. 8 (PEACE RESOLUTION), APPROVED JULY 2, 1921 (c. 40, 42 STAT. 105)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

SEC. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 3. That the state of war declared to exist between the Imperial and Royal Austro-Hungarian Government and the United States of America by the joint resolution of Congress approved December 7, 1917, is hereby declared at an end.

SEC. 4. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 3, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Saint Germain-en-Laye or the treaty of Trianon, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever and all property of the Imperial and Royal Austro-Hungarian Government or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and

no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments, respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce, and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian na-

tionals, and shall have waived any and all pecuniary claims against the United States of America.

SEC. 6. Nothing herein contained shall be construed to repeal, modify, or amend the provisions of the joint resolution "declaring that certain Acts of Congress, joint resolutions, and proclamations shall be construed as if the war had ended and the present or existing emergency expired", approved March 3, 1921, or the passport control provisions of an Act entitled "An act making appropriations for the diplomatic and consular service for the fiscal year ending June 30, 1922", approved March 2, 1921; nor to be effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the Selective Service law, approved May 18, 1917, of any person who failed to comply with the provisions of said Act or of Acts amendatory thereof.

Approved July 2, 1921.

TREATY OF BERLIN (42 STAT. 1939)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

WHEREAS, by a Joint Resolution of Congress, approved March 3, 1921, it was declared that certain Acts of Congress, joint resolutions and proclamations should be construed as if the war between the United States of America and the Imperial German Government had ended, but certain acts of Congress and proclamations issued in pursuance thereof were excepted from the operation of the said resolution;

WHEREAS, by a Joint Resolution of Congress approved July 2, 1921, the state of war which was declared by the Joint Resolution of Congress approved April 6, 1917, to exist between the United States of America and the Imperial German Government was declared at an end;

WHEREAS, a treaty between the United States and Germany was signed at Berlin on August 25, 1921, to restore the friendly relations existing between the two nations prior to the outbreak of war, which treaty is word for word as follows:

THE UNITED STATES OF AMERICA AND GERMANY:

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force according to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

"*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"SEC. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

* * * * *

"SEC. 5. All property of the Imperial German Government, or its successor or suc-

cessors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or

otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:

Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Ellis Loring Dresel, Commissioner of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Friedrich Rosen, Minister for Foreign Affairs,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

ARTICLE II

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action

taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

ARTICLE III

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

IN WITNESS WHEREOF the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August 1921.

[SEAL] ELLIS LORING DRESEL

[SEAL] ROSEN

AND WHEREAS, the said treaty has been duly ratified on both parts, and the ratifications of the two countries were exchanged at Berlin on November 11, 1921;

NOW THEREFORE be it known that I, Warren G. Harding, President of the United States of America, hereby proclaim that the war between the United States and Germany terminated on July 2, 1921, and cause the said treaty to be made public to the end that every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this fourteenth day of November One Thousand Nine Hundred and Twenty-one and of the Independence of the United States of America the One Hundred and Forty-sixth.

[SEAL] WARREN G. HARDING

By the President:

CHARLES E. HUGHES

Secretary of State.

THE TREATY OF VERSAILLES

(Reprinted in Sen. Doc. No. 348, 67th Cong., 4th Sess., pp. 3329–3524)

PART X. SECTION IV. PROPERTY, RIGHTS, AND INTERESTS

Article 297

The question of private property, rights, and interests in an enemy country shall be settled according to the principles laid down in this Section and to the provisions of the Annex hereto.

* * * * *

(b) Subject to any contrary stipulations which may be provided for in the present Treaty, the Allied and Associated Powers reserve the right to retain and liquiate all property, rights and interests belonging at the date of the coming into force of the present Treaty to German nationals, or companies controlled by them, within their territories, colonies, possessions and protectorates, including territories ceded to them by the present Treaty.

The liquidation shall be carried out in accordance with the laws of the Allied or Associated State concerned, and the German owner shall not be able to dispose of such property, rights or interests nor to subject them to any charge without the consent of that State.

* * * * *

(d) As between the Allied and Associated Powers or their nationals on the one hand and Germany or her nationals on the other hand, all the excep-

tional war measures, or measures of transfer, or acts done or to be done in execution of such measures as defined in paragraphs 1 and 3 of the Annex hereto shall be considered as final and binding upon all persons except as regards the reservations laid down in the present Treaty.

(e) The nationals of Allied and Associated Powers shall be entitled to compensation in respect of damage or injury inflicted upon their property, rights or interests, including any company or association in which they are interested, in German territory as it existed on August 1, 1914, by the application either of the exceptional war measures or measures of transfer mentioned in paragraphs 1 and 3 of the Annex hereto. The claims made in this respect by such nationals shall be investigated, and the total of the compensation shall be determined by the Mixed Arbitral Tribunal provided for in Section VI or by an Arbitrator appointed by that Tribunal. This compensation shall be borne by Germany, and may be charged upon the property of German nationals within the territory or under the control of the claimant's State. This property may be constituted as a pledge for enemy liabilities under the conditions fixed by paragraph 4 of the Annex hereto. The payment of this compensation may be made by the Allied or Associated State, and the amount will be debited to Germany.

* * * * *

(h) Except in cases where, by application of paragraph (f), restitutions in specie have been made, the net proceeds of sales of enemy property, rights or interests wherever situated carried out either by virtue of war legislation, or by application of this Article, and in general all cash assets of enemies, shall be dealt with as follows: * * *

(2) As regards Powers not adopting Section III and the Annex thereto, the proceeds of the property, rights and interest, and the cash assets, of the nationals of Allied or Associated Powers held by Germany shall be paid immediately to the person entitled thereto or to his Government; the proceeds of the property, rights and interests, and the cash assets, of German nationals received by an Allied or Associated Power shall be subject to disposal by such Power in accordance with its laws and regulations and may be applied in payment of the claims and debts defined by this Article or paragraph 4 of the Annex hereto. * * *

(i) Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interests in Allied or Associated States.

ANNEX

3.

In Article 297 and this Annex the expression "exceptional war measures" includes measures of all kinds, legislative, administrative, judicial or others, that have been taken or will be taken hereafter with regard to enemy property, and which have had or will have the effect of removing from the proprietors the power of disposition over their property, though without affecting the ownership, such as measures of supervision, of compulsory administration, and of sequestration; or measures which have had or will have as an object the seizure of, the use of, or the interference with enemy assets, for whatsoever motive, under whatsoever form or in whatsoever place. Acts in the execution of these measures include all detentions, instructions, or-

ders, or decrees of Government departments or courts applying these measures to enemy property, as well as acts performed by any person connected with the administration or the supervision of enemy property, such as the payment of debts, the collecting of credits, the payment of any costs, charges or expenses, or the collecting of fees.

Measures of transfer are those which have affected or will affect the ownership of enemy property by transferring it in whole or in part to a person other than the enemy owner, and without his consent, such as measures directing the sale, liquidation, or devolution of ownership in enemy property, or the cancelling of titles or securities.

4.

All property, rights and interests of German nationals within the territory of any Allied or Associated Power and the net proceeds of their sale, liquidation or other dealing therewith may be charged by that Allied or Associated Power in the first place with payment of amounts due in respect of claims by the nationals of that Allied or Associated Power with regard to their property, rights and interests, including companies and associations in which they are interested, in German territory, or debts owing to them by German nationals, and with payment of claims growing out of acts committed by the German Government or by any German authorities since July 31, 1914, and before that Allied or Associated Power entered into the war. The amount of such claims may be assessed by an arbitrator appointed by Mr. Gus-

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tave Ador, if he is willing, or if no such appointment is made by him, by an arbitrator appointed by the Mixed Arbitral Tribunal provided for in Section VI. They may be charged in the second place with payment of the amounts due in respect of claims by the nationals of such Allied or Associated Power with regard to their property, rights and interests in the territory of other enemy Powers, in so far as those claims are otherwise unsatisfied.

AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY FOR A MIXED CLAIMS COMMISSION (42 STAT. 2200)

AGREEMENT

The United States of America and Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be

presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL] ALANSON B. HOUGHTON.

[SEAL] WIRTH.

DEBT FUNDING AGREEMENT OF 1930

(Reprinted in Annual Report of the Secretary of the Treasury for the year ended June 30, 1930, pp. 341-347)

Agreement made the 23d Day of June, 1930, at the City of Washington, District of Columbia, between the Government of the German Reich, hereinafter called Germany, party of the first part, and the Government of the United States of America, hereinafter called the United States, party of the second part.

Whereas Germany is obligated under the provisions of the armistice convention signed November 11, 1918, and of the treaty signed at Berlin, August 25, 1921, to pay to the United States the awards, and interest thereon, entered and to be entered in favor of the United States Government and its nationals by the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922; and

Whereas the United States is also entitled to be reimbursed for the costs of its army of occupation; and

Whereas Germany having made and the United States having received payments in part satisfaction on account of these two obligations desire to make arrangements for the complete and final discharge of said obligations;

Now, therefore, in consideration of the premises and the mutual covenants herein contained, it is agreed as follows:

1. *Amounts to be paid.*—(a) Germany shall pay and the United States shall accept in full satisfaction of all of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichsmarks for the period of September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichsmarks per annum from April 1, 1930, to March 31, 1981. As evidence of this indebtedness, Germany shall issue to the United States at par, as of September 1, 1929, bonds of Germany, the first of which shall be in the principal amount of 40,800,000 reichsmarks, dated September 1, 1929, and maturing March 31, 1930, and each of the others of which shall be in the principal amount of 20,400,000 reichsmarks, dated September 1, 1929, and maturing serially on September 30, 1930, and on each succeeding March 31 and September 30 up to and including March 31, 1981. The obligations of Germany hereinabove set forth in this paragraph shall cease as soon as all of the payments contemplated by the settlement of war claims act of 1928 have been completed and the bonds not then matured evidencing such obligations shall be canceled and returned to Germany.

(b) Germany shall pay and the United States shall accept in full reimbursement of the amounts remaining due on account of the costs of the United States army of occupation, the amounts set forth on the several dates fixed in the following schedule:

March 31:	*Reichsmark*
1930	25,100,000
1931	12,750,000
1932	12,650,000
1933	12,650,000
1934	9,300,000
1935	9,300,000
1936	9,300,000
1937	9,300,000
1938	8,200,000
1939	8,200,000
1940	9,300,000
1941	9,300,000
1942	12,650,000
1943	12,650,000
1944	12,650,000
1945	12,650,000
1946	12,650,000
1947	12,650,000
1948	12,650,000
1949	12,650,000
1950	17,650,000
1951	17,650,000
1952	17,650,000
1953	17,650,000
1954	17,650,000
1955	17,650,000
1956	17,650,000
1957	17,650,000
1958	17,650,000
1959	17,650,000
1960	17,650,000
1961	17,650,000
1962	17,650,000
1963	17,650,000
1964	17,650,000
1965	17,650,000
1966	17,650,000

September 30:	*Reichsmark*
1930	12,750,000
1931	12,650,000
1932	12,650,000
1933	9,300,000
1934	9,300,000
1935	9,300,000
1936	9,300,000
1937	8,200,000
1938	8,200,000
1939	9,300,000
1940	9,300,000
1941	12,650,000
1942	12,650,000
1943	12,650,000
1944	12,650,000
1945	12,650,000
1946	12,650,000
1947	12,650,000
1948	12,650,000
1949	17,650,000
1950	17,650,000
1951	17,650,000
1952	17,650,000
1953	17,650,000
1954	17,650,000
1955	17,650,000
1956	17,650,000
1957	17,650,000
1958	17,650,000
1959	17,650,000
1960	17,650,000
1961	17,650,000
1962	17,650,000
1963	17,650,000
1964	17,650,000
1965	17,650,000

As evidence of this indebtedness, Germany shall issue to the United States at par, as of September 1, 1929, bonds of Germany, dated September 1, 1929, and maturing on March 31, 1930, and on each succeeding September 30 and March 31 in the

amounts and on the several dates fixed in the preceding schedule.

2. *Form of bonds.*—All bonds issued hereunder to the United States shall be payable to the Government of the United States of America and shall be signed for Germany by the Reichsschuldenverwaltung. The bonds issued for the amounts to be paid under paragraph No. 1 (a) of this agreement shall be issued in 103 pieces with maturities and in denominations corresponding to the payments therein set forth and shall be substantially in the form set forth in Exhibit A hereto annexed and shall bear no interest, unless payment thereof is postponed pursuant to paragraph No. 5 of this agreement. The bonds issued for the amounts to be paid under paragraph No. 1 (b) of this agreement shall be issued in 73 pieces with maturities and in denominations corresponding to the payments therein set forth and shall be substantially in the form set forth in Exhibit B hereto annexed and shall bear no interest unless payment thereof is postponed pursuant to paragraph No. 5 of this agreement.

3. *Method of payment.*—All bonds issued hereunder shall be payable both principal and interest, if any, at the Federal Reserve Bank of New York for credit in the general account of the Treasurer of the United States in funds immediately available on the date when payment is due in United States gold coin in an amount in dollars equivalent to the amount due in reichsmarks, at the average of the middle rates prevailing on the Berlin Bourse, during the half monthly period preceding the date of payment. Germany undertakes to have

the Reichsbank certify to the Federal Reserve Bank of New York on the date of payment the rate of exchange at which the transfer shall be made. Germany undertakes for the purposes of this agreement that the reichsmark shall have and shall retain its convertibility into gold or devisen as contemplated in section 31 of the present Reichsbank law and that for these purposes the reichsmark shall have and shall retain a mint parity of 1/2790 kilogram of fine gold as defined in the German coinage law of August 30, 1924.

4. *Security.*—The United States hereby agrees to accept the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations hereunder.

5. *Postponement of payment.*—Germany, at its option, upon not less than 90 days' advance notice in writing to the United States, may postpone any payment on account of principal falling due as hereinabove provided, to any subsequent September 30 or March 31 not more than two and one-half years distant from its due date, but only on condition that in case Germany shall at any time exercise this option as to any payment of principal, the two payments falling due in the next succeeding twelve months can not be postponed to any date more than two years distant from the date when the first payment therein becomes due unless and until the payments previously postponed shall actually have been made, and the two payments falling due in the second succeeding twelve months can not be postponed to any date more than one year distant from the date when the first payment therein becomes due unless and until the payments

previously postponed shall actually have been made, and further payments can not be postponed at all unless and until all payments of principal previously postponed shall actually have been made. All payments provided for under paragraph No. 1 (a) of this agreement so postponed shall bear interest at the rate of 5 per cent per annum, payable semiannually, and all payments provided for under paragraph No. 1 (b) of this agreement so postponed shall bear interest at the rate of 3⅝ per cent per annum, payable semi-annually.

6. *Payments before maturity.*—Upon not less than 90 days' advance notice in writing to the United States and the approval of the Secretary of the Treasury of the United States, Germany may, on March 31 or September 30 of any year, make advance payments on account of any bonds issued under this agreement and held by the United States. Any such advance payments shall be applied to the principal of such bonds as may be indicated by Germany at the time of the payment.

7. *Exemption from taxation.*—The principal and interest, if any, of all bonds issued hereunder shall be paid without deduction for, and shall be exempt from, any and all taxes or other public dues, present or future, imposed by or under authority of Germany or any political or local taxing authority within Germany.

8. *Notices.*—Any notice from or by Germany shall be sufficient if delivered to the American Embassy at Berlin or to the Secretary of the Treasury at the Treasury of the United States in Washington. Any notice, request, or consent under the

hand of the Secretary of the Treasury of the United States shall be deemed and taken as the notice, request, or consent of the United States and shall be sufficient if delivered at the German Embassy at Washington or at the office of the German Ministry of Finance at Berlin. The United States in its discretion may waive any notice required hereunder, but any such waiver shall be in writing and shall not extend to or affect any subsequent notice or impair any right of the United States to require notice hereunder.

9. *Compliance with legal requirements.*—Germany and the United States, each for itself, represents and agrees that the execution and delivery of this agreement have in all respects been duly authorized, and that all acts, conditions, and legal formalities which should have been completed prior to the making of this agreement have been completed as required by the laws of Germany and of the United States respectively and in conformity therewith.

10. *Counterparts.*—This agreement shall be executed in two counterparts, each of which shall be in the English and German languages, both texts having equal force and each counterpart having the force and effect of an original.

In witness whereof, Germany has caused this agreement to be executed on its behalf by its ambassador extraordinary and plenipotentiary at Washington thereunto duly authorized, and the United States has likewise caused this agreement to be executed on its behalf by the Secretary of the Treasury, with the approval of the President, pur-

suant to the act of Congress approved June 5, 1930, all on the day and year first above written.

THE GERMAN REICH,
By F. VON PRITTWITZ UND GAFFRON,
Ambassador Extraordinary and Plenipotentiary.

THE UNITED STATES OF AMERICA,
By A. W. MELLON,
Secretary of the Treasury.

Approved.

HERBERT HOOVER,
President.

NOTES EXCHANGED BETWEEN GERMANY AND THE UNITED STATES SIMULTANEOUSLY WITH THE EXECUTION OF THE AGREEMENT FOR THE COMPLETE AND FINAL DISCHARGE OF THE OBLIGATIONS OF GERMANY TO THE UNITED STATES WITH RESPECT TO THE AWARDS MADE BY THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY, AND FOR THE COSTS OF THIS GOVERNMENT'S ARMY OF OCCUPATION

The German Government (the Government of the United States) has the honor to set forth its understanding of paragraph No. 4 of the agreement executed this day between the United States and Germany in the following sense:

(a) In respect of the acceptance by the United States of the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations under the agreement, Germany will be in the same position as the principal debtors of the United States under the debt funding agreements which exist between them and the United States.

(b) Nothing contained therein shall be construed as requiring the United States to release

any German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States.

The German Government (the Government of the United States) also desires to expressly recognize, so far as the agreement executed this day between the United States and Germany is concerned, the prior rights of the holders of the bonds of the German external loan as provided in the general bond securing the loan dated October 10, 1924.

Bonds No. 1 in the amounts of R. M. 40,800,000 and R. M. 25,100,000 to be delivered under paragraphs Nos. 1 (a) and 1 (b) respectively of the agreement executed this day between the United States and Germany have been paid in full and when the bonds to be delivered by Germany under this agreement are received by the United States, bonds No. 1 will be canceled and marked "paid" and returned to the German ambassador at Washington for delivery to the German Government.

The United States has received the sum of R. M. 6,800,000 and the sum of R. M. 4,250,000 on account of the bonds No. 2 to be delivered under paragraphs Nos. 1 (a) and 1 (b) respectively of the agreement executed this day between the United States and Germany. The receipt of these amounts will be evidenced by an indorsement by the United States on the bonds on account of which the sums were received.

The agreement executed this day between the United States and Germany is substituted for the direct arrangement providing for the realization by the United States of its 2¼ per cent share in German payments under the experts' plan of 1924.

SENATE REPORT NO. 1376, 73D CONGRESS, 2D SESSION

The Committee on Finance, to whom was referred the joint resolution (S. J. Res. 135) to amend the Settlement of War Claims Act of 1928, as amended, having considered the same, report favorably thereon with amendments, and recommend that the resolution, as amended, do pass.

Following the war, German nationals had claims against the United States such as claims arising from our seizure of property owned by German nationals. Similarly, American nationals had claims against the German Government arising out of the war. On July 2, 1921, Congress passed the Knox-Porter Peace Resolution (later incorporated in the Peace Treaty between the United States and Germany) which provided that none of the property of the German Government and German nationals which was seized during the war should be returned until Germany had made suitable provision for the satisfaction of the claims of the United States and its nationals against Germany arising out of the war.

Germany was not in a position to make a lump payment of the amount due to Americans. Accordingly, the United States consented to the German-American Debt Agreement (June 23, 1930) under which Germany agreed (among other things) to make payment in installments over a period of years of an aggregate amount equal to the estimated amount due to American nationals. The installments were not sufficiently large to per-

mit of early payments in substantial amounts. Accordingly, the American Congress appropriated $86,000,000 to be deposited in an account known as the "German Special Deposit Account", out of which payments were to be made in accordance with priorities established in the Settlement of War Claims Act of March 10, 1928. Of this $86,000,000 approximately $43,000,000 was paid to American nationals and $43,000,000 to German nationals.

The German Government took advantage of the provisions of the German-American debt agreement permitting postponement of its principal installment payments for a period not exceeding 2½ years. On March 31 of this year both the postponed installments and the installment due on that date became payable, but were not paid. The German Government did, however, make payment of interest as required by the agreement until last September, when, instead of making the interest payment to the United States, it notified the United States that it had established a credit in marks in a German bank corresponding to the interest due. On March 31 of this year Germany made payment in dollars in the United States of the current interest due; but as previously stated, failed to make payment of the principal installments due. Furthermore, the German Government has failed to make satisfactory assurances as to when those installments will be paid.

The result is that while the United States has fulfilled its undertakings, Germany has failed to make suitable provision for the satisfaction of the claims of the United States and its nationals called

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for in the Knox-Porter peace resolution. Under these circumstances it would appear to be in accord with the policy of the Congress as declared in that resolution to postpone any further liquidation of the claims of German nationals against the United States until the German Government fulfills its undertakings to provide for satisfaction of the claims of American nationals against it. The resolution reported is designed to carry out this policy.

The foregoing is stated in very general terms for the reason that it would be difficult to present in brief form a picture of the whole question of the war claims were an attempt made, at the same time, to set out the details and the necessary qualifications covering variations not essential to the point at issue.

A detailed statement of the situation, together with an explanation of amendments similar to those agreed to by your committee, and which are clarifying in character, is contained in the report (appended herewith) of the House Committee on Ways and Means upon a companion resolution, House Joint Resolution 365.

HOUSE REPORT NO. 1924, SEVENTY-THIRD CONGRESS, SECOND SESSION

The Committee on Ways and Means, to whom was referred the joint resolution (H. J. Res. 365) to amend the Settlement of War Claims Act of 1928, as amended, having had the same under consideration, report it back to the House with amendments and recommend that the joint resolution as amended do pass.

The amendments are as follows:

On page 3, line 11, strike out "any or".

On page 4, line 14, after "postponed" insert "under this resolution".

On page 4 strike out in lines 15 to 18, inclusive, the following: "the action of the President in determining the period or periods in which Germany is in arrears in the payments hereinbefore described shall not be subject to judicial review" and insert in lieu thereof "the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described and his determination thereof shall not be subject to judicial review".

The purpose of this resolution is to postpone (*a*) further payments to German nationals from the German special deposit account in the Treasury Department, established under section 4 of the Settlement of War Claims Act of 1928, on account of awards made by the War Claims Arbiter for ships, patents, and a radio station seized and used

by this Government during the war, and (*b*) further return of property belonging to German nationals held by the Alien Property Custodian, while Germany is in arrears on her payments on claims of American nationals under the debt agreement of June 23, 1930.

By the terms of the settlement of War Claims Act, the awards in favor of German nationals for ships, patents, and a radio station, and the awards entered by the Mixed Claims Commission against Germany in favor of American nationals were to be paid in accordance with the scheme of priorities established in section 4 (*c*) of the act.

Germany is now in arrears on the payments due under the debf agreement of June 23, 1930, and there is no assurance when those arrears will be discharged or further annual payments made. It is not felt that this Government should make further payments to German nationals from the limited funds that may be available in the German special-deposit account, or that it should return the small amount of property still held by the Alien Property Custodian while Germany's obligations under the debt agreement remain in their present state.

The resolution withholds all amounts which may become payable to German nationals under the Settlement of War Claims Act of 1928 and withholds the return of all property belonging to German nationals now held by the Alien Property Custodian under the Trading with the Enemy Act as amended. In view of the many complicated matters involved it is believed that a review of the problems before Congress at the time it passed the Settlement of War Claims Act and a review of

subsequent events may be useful to the Members of the House.

The Settlement of War Claims Act of 1928 was approved March 10, 1928. The act is complicated by reason of the innumerable complex situations covered by it and also by the complexities of the Trading with the Enemy Act, which was amended in several particulars by the Settlement of War Claims Act.

There were three major problems involving the United States and its nationals and the German Government and its nationals arising out of the war which the act attempted to settle. In order not to unduly complicate the matter, similar problems involving the United States and its nationals in their relation to the Austrian and Hungarian Governments and their nationals, also covered in the act, are not covered in this report. The three major problems referred to were as follows:

1. *Alien property.*—Property of German nationals in the United States was seized during the war by the Alien Property Custodian under the provisions of the Trading with the Enemy Act, as amended, and a large part, estimated at a value of over $200,000,000, was being held at the time of the enactment of the Settlement of War Claims Act with no authority in the Executive to return it. Under the Knox-Porter peace resolution of July 2, 1921, quoted in part in the first paragraph of the preamble of House Joint Resolution 365 and which was incorporated in full in the Treaty of Berlin, the United States unquestionably possessed the right to retain this property until Germany had made suitable provision for the satisfaction of the claims of American nationals against the German

Government. Congress in the Settlement of War Claims Act authorized the return of 80 percent of the aggregate value of the property of German nationals so held, and further authorized that the remaining 20 percent of the aggregate value of such property be retained and invested in 5 percent certificates which participate under certain conditions and in a certain order of priority in the funds in the German special deposit account in the Treasury created by the Settlement of War Claims Act.

2. *Mixed claims.*—The United States Government and many American nationals suffered losses during the war period by reason of acts for which the German Government was responsible, and their claims had to be satisfied. A commission, known as the "Mixed Claims Commission, United States and Germany", was created by the agreement of August 10, 1922, to hear and determine the claims and to enter awards for the losses for which Germany was responsible. Through arrangements made by the Secretary of State with the Allied Governments, there had been allocated to the United States under the provisions of the Finance Ministers' agreement of January 14, 1925, 2¼ percent of all receipts paid by Germany which were available for reparation payments, with a proviso that the sum so allocated should not exceed 45,000,000 gold marks in any one year. The United States was, therefore, receiving at the time of the enactment of the Settlement of War Claims Act approximately $11,000,000 per annum through the Reparation Commission for account of Germany's obligations.

By passing the Settlement of War Claims Act, Congress in effect recognized that arrangements

had been made which if fulfilled constituted a "suitable provision for the satisfaction of all claims" against Germany required by the joint resolution of July 2, 1921. By the debt agreement of June 23, 1930, an arrangement was made directly with Germany which superseded the previously mentioned arrangement and provided for the gradual liquidation of the Mixed Claims awards through the payment of an annual sum of 40,800,000 reichsmarks ($9,700,000) for a period of 52 years, in semiannual installments of 20,400,000 reichsmarks each. Congress approved this agreement. But if the American claimants had been forced to rely upon only the distributive share in the payments to be made under the two arrangements mentioned, more than 70 years would have been required for payment in full. It was necessary, therefore, that some method be provided by which the American claimants could obtain a more immediate payment.

3. *Awards of War Claims Arbiter in favor of German nationals.*—The United States Government, under the authority of a joint resolution of Congress, during the war seized and took title to a large number of ships owned by citizens of Germany and acquired for its own use during the war a large number of patents and a radio station. The United States recognized a duty to make compensation on these accounts to the German nationals for the value of their property so taken and used. The Settlement of War Claims Act created the office of War Claims Arbiter and authorized the Arbiter to hear the claims of the German nationals and to determine the fair compensation to be paid by the United States. Some provision had

to be made for the payment of the amounts determined to be due.

The Settlement of War Claims Act recognized the close relationship between the three problems and their solution as a whole. Under the circumstances, it was not possible to provide for the immediate payment of all American claimants, nor the immediate payment of all owners of the ships, patents, and the radio station, nor the immediate return of all the alien property. The act did, however, provide for the immediate payment of as large a percentage as possible of the claims of the American nationals and the German nationals, and for the return of as large a percentage as possible of the alien property, with a provision for the payment of the balance due over a period of years.

The act created in the Treasury a German special deposit account into which the Secretary of the Treasury was directed to deposit the following funds:

(*a*) All sums invested by the Alien Property Custodian under the provisions of section 25 (a) of the Trading with the Enemy Act, as amended, which represents 20 per cent of the aggregate value of the property of German nationals temporarily retained by the Alien Property Custodian. As the funds are invested as required by the Trading with the Enemy Act and deposited in the German special deposit account, the Secretary of the Treasury issues to the Alien Property Custodian a 5 per cent participating certificate, which is payable in accordance with the priorities hereinafter enumerated.

(*b*) All sums transferred by the Alien Property Custodian under the provisions of section 25 (b)

of the Trading with the Enemy Act, as amended, which was referred to as the "Unallocated interest fund" and which represented the interest accrued prior to March 4, 1923, on investments of funds of the Alien Property Custodian, plus interest on the investment of such interest after March 4, 1923. No authority of law exists for distributing any interest accruing on the investment of the funds prior to March 4, 1923, the date of the approval of the Winslow Act, which act authorized the return of not to exceed $10,000 per annum to any one person, of the income accruing after that date.

(*c*) Amounts appropriated by Congress for the payment of awards of the War Claims Arbiter in favor of German nationals for ships, patents, and a radio station.

(*d*) All moneys received from Germany on account of the awards of the Mixed Claims Commission in favor of American nationals.

(*e*) Earnings on investments of funds in the deposit account.

The act authorized and directed the Secretary of the Treasury to make payments out of the German special deposit account in the following order of priority:

(1) Payment of expenses of administration.

(2) Payment in full of awards in favor of American nationals attributable to death and personal injury, togeth r with interest thereon up to the date of payment.

(3) Payment in full of awards in favor of American nationals, the amount of which, including interest to January 1, 1928, does not exceed

$100,000, together with interest on such amount from January 1, 1928, to the date of payment.

(4) Payment of $100,000 on account of awards in favor of an American national, the amount of which, including accrued interest to January 1, 1928, is in excess of $100,000, provided no person shall be paid an amount in excess of $100,000 under this priority, irrespective of the number of awards made in his behalf.

(5) Additional payments on awards in excess of $100,000, including interest to January 1, 1928, entered in favor of American nationals, as and when funds are available for this purpose as determined by the Secretary of the Treasury, until the aggregate payments authorized by priorities 2 to 5 equal 80 percent of the aggregate amount of the awards entered, including interest to January 1, 1928.

It is pointed out that all the payments authorized by paragraphs 2, 3, and 4 above have been practically completed. There are a few cases remaining unpaid because the claimants cannot be located and for other reasons, but funds have been reserved for their complete payment. As to paragraph 5, payments have been made which aggregate about 74½ percent of the amount authorized to be paid under these priorities. There remains, therefore, approximately 5½ percent (about $2,000,000) to complete this priority to American nationals.

(6) Payment to German nationals of 50 percent of the awards entered by the War Claims Arbiter for ships, patents, and a radio station, including interest to December 31, 1928. The Secretary of

the Treasury was authorized to pay this amount without regard to any of the other priorities.

(7) Payment of accrued interest upon the 5-percent participating certificates evidencing the amounts invested by the Alien Property Custodian.

(8) Payment of accrued interest since January 1, 1928, on awards of the Mixed Claims Commission in excess of $100,000 in amount, including accrued interest to January 1, 1928, in favor of American nationals and accrued interest since December 31, 1928, on awards of the War Claims Arbiter in favor of German nationals for ships, patents, and a radio station, including accrued interest to December 31, 1928.

(9) Pro-rata payments, to the extent funds are available, (*a*) to the Alien Property Custodian on the 5 percent participating certificates held by him as evidence of the investment of funds representing 20 percent of German property temporarily retained; (*b*) to German nationals on account of the balance due on their awards entered by the War Claims Arbiter for ships, patents, and a radio station, including interest to December 31, 1928; and (*c*) to American nationals on account of the balance due on awards in excess of $100,000 in amount, including interest to January 1, 1928, entered by the Mixed Claims Commission.

(10) Payment to German nationals on account of the "Unallocated interest fund." No interest accrues on this sum.

(11) Payment to the United States Government on account of awards entered in its behalf by the Mixed Claims Commission, together with interest on such awards.

The Trading with the Enemy Act, as amended by the Settlement of War Claims Act, authorized the return of 80 percent of the aggregate value of the property of German nationals, as determined by the Alien Property Custodian; authorized the temporary retention of the remaining 20 percent; and authorized that funds equal to the value of such property so retained be paid to the German nationals from the German special deposit account in the order of priority established by the Settlement of War Claims Act.

The following is a statement showing the amounts of the various classes of claims, the payments made on account of each class, and the balance due as of March 31, 1934:

I. Principal of awards of Mixed Claims Commission	$128,500,000	
Interest to Jan. 1, 1928	40,500,000	
Amount due Jan. 1, 1928	169,000,000	
Payments made on account	134,000,000	
	35,000,000	
Interest accrued at 5 percent per annum, from Jan. 1, 1928, to Mar. 31, 1934	19,000,000	
Balance due as of Mar. 31, 1934		$54,000,000
II. Principal of awards of War Claims Arbiter	63,200,000	
Interest to Dec. 31, 1928	23,500,000	
Amount due Dec. 31, 1928	86,700,000	
Payments made on account	43,400,000	
	43,300,000	
Interest accrued at 5 percent per annum, from Dec. 31, 1928, to Mar. 31, 1934	16,100,000	
Balance due as of Mar. 31, 1934		$59,400,000

III. Twenty percent of German property temporarily retained:		
Investment by Alien Property Custodian	$17,550,000	
Investment yet to be made by Alien Property Custodian ($15,500,000).		
Interest accrued on investment to Mar. 31, 1934	3,600,000	
Balance due as of Mar. 31, 1934		$21,150,000
IV. Unallocated interest fund		21,750,000
Amount due private claimants from German special deposit account as of Mar. 31, 1934		156,300,000
V. Principal of awards entered in behalf of the United States Government	$42,035,000	
Interest to Mar. 31, 1934	38,300,000	
		80,335,000
Total including accrued interest		236,635,000

In addition it is understood that the Alien Property Custodian has property in his hands valued at approximately $10,000,000, of which 80 or 90 percent is estimated to belong to German nationals. Under the law as it now stands, 80 percent of this property would probably be returned this calendar year, the remaining 20 percent to be retained for deposit in the German special-deposit account.

The following shows the funds made, or to be made, available to the German special-deposit account and the payments that have been made out of such account:

Receipts:		
From investments of Alien Property Custodian under Trading with the Enemy Act, as amended:		
Unallocated interest fund	$21,750,000	
20 percent German property retained	17,550,000	
Total		$39,300,000

Receipts—Continued		
From Germany:		
2¼ percent of receipts as authorized by Finance Ministers' agreement of Jan. 14, 1925	$32,183,000	
Under debt agreement of June 23, 1930	20,198,000	
Total		$52,381,000
Appropriation made by Congress for ships, patents, and radio station (awards for War Claims Arbiter)		86,852,000
Earnings and profits on investments		4,181,000
Total receipts		182,714,000
Payments:		
On account of awards of the Mixed Claims Commission	$134,000,000	
On account of awards of the War Claims Arbiter	43,368,000	
Miscellaneous payments (expenses, etc.)	817,000	
Total		$178,185,000
Balance in German special-deposit account		4,529,000
Funds in hands of Alien Property Custodian available for deposit in German special-deposit account		15,500,000
Total available to German special-deposit account		20,029,000

It will be noted that the funds now available to the German special deposit account amount to about $20,000,000, which are being reserved to make payment on account of any awards which the Mixed Claims Commission might enter on the claims now pending before it. In case awards are entered on account of the claims now pending before the Commission, payments will be made in the same manner and to the same extent as payments have already been made on account of awards entered and certified for payment. On the other hand, if the claims pending before the Commission

are disallowed, the $20,000,000 held in reserve will be released and distributed to American and German Nationals in accordance with priorities specified in section 4 (c) of the Settlement of War Claims Act, hereinabove enumerated. In such case the funds made available, together with 80 percent of the value of the property in the hands of the Alien Property Custodian estimated at $6,500,000, or a total of $26,500,000, would be distributed approximately as follows:

To American nationals:		
Balance of 80 percent of awards of Mixed Claims Commission under priority no. 5 (5½ percent remaining unpaid)	$2,000,000	
On account of interest accrued since Jan. 1, 1928 (approximately 40 percent of such interest)	7,800,000	
Total to American nationals		$9,800,000
To German nationals:		
Interest on 5-percent participating certificates (20 percent of German property temporarily retained)	$3,600,000	
On account of interest accrued since Dec. 31, 1928, on awards of War Claims Arbiter (approximately 40 percent of such interest)	6,600,000	
Return of property in hands of Alien Property Custodian	6,500,000	
Total to German nationals		16,700,000
Total available for distribution		26,500,000

Under the debt agreement of June 23, 1930, the German Government is obligated to pay semiannually to the United States for a period of 52 years on account of the awards of the Mixed Claims Commission, the sum of 20,400,000 reichsmarks ($4,850,000 at the time the agreement was concluded, or about $8,150,000 at the present mint parity of the mark). Under the debt agreement

that Government has the option of postponing payment of the installments due for a period of 2½ years, but the amounts so postponed bear interest at the rate of 5 percent per annum, payable semiannually.

The Hoover moratorium was declared in June, 1931, and covered payments falling due during the year July 1, 1931, to June 30, 1932. It excepted private obligations, and the joint resolution of December 23, 1931, authorizing that moratorium, treated the payments due on account of mixed claims as falling under the exception. Germany, however, took advantage of the option in the agreement to postpone the payments due, and has exercised that option ever since up to and including the payment due September 30, 1933. It paid the interest semiannually up to March 31, 1933, but the semiannual payment of interest due on September 30, 1933, was paid in reichsmarks into an account in Germany and was not transferred to the United States, as required by the terms of the debt agreement. It is understood that the United States advised the German Government that it could not accept the payment in reichsmarks as a compliance with the debt agreement.

On March 31, 1934, all of the installments aggregating 102,000,000 reichsmarks, previously postponed since September 30, 1931, together with the semiannual installment of 20,400,000 reichsmarks and semiannual interest of 2,550,000 reichsmarks, or a total of 122,400,000 reichsmarks (about $50,000,000), were due and payable. Germany advised that it could not meet the principal payments falling due, but would and did pay the interest due of 2,550,000 reichsmarks (about $1,000,000).

The Treasury holds German bonds for account of mixed claims in the face amount of 2,040,000,000 reichsmarks ($500,000,000 at time of acquisition but $800,000,000 at present rates).

The debt agreement of June 23, 1930, provides that the obligation of Germany to make the payments specified therein shall cease as soon as all of the payments contemplated by the Settlement of War Claims Act of 1928 have been completed and the bonds of Germany held by the United States not then matured shall be canceled and returned to Germany.

The amendment to the joint resolution striking out "any or" and the amendment inserting "under this resolution" are clerical clarifying amendments. The amendment to the last proviso specifically empowers the President to determine the period or periods in which Germany is in arrears on her payments and retains the substance of the provision stricken out so that judicial review of the President's determination is denied.

107718—36——8

DECREE ISSUED BY ACTING REICHSWIRTSCHAFTS-MINISTER HJALMAR SCHACHT, PRESIDENT OF THE REICHSBANK'S DIRECTORIUM, ON FEBRUARY 4, 1935, FOR CARRYING OUT THE ACT OF FEBRUARY 4, 1935, REGARDING THE REGULATION OF FOREIGN EXCHANGE (REICHSGESETZBLATT, 1935, PART I, PAGE 114 ET SEQ.) (TRANSLATED BY ERNST-THEODOR ARNDT, DEPARTMENT OF JUSTICE.)

ARTICLE I

§ 1

(1) Natural persons who have their domicile or their regular place of residence in Germany, further

1. Stock corporations, colonial corporations, mining associations, * * *;

2. Societies, institutions, and other civil law corporations which are *sui juris* or not *sui juris* * * *;

3. Partnerships, commandite companies [i. e., companies in which some of the partners are liable for the company's obligation, some with and some without limitation], and similar companies * * *.

4. Corporations and institutions of the public law providing the principal place of business or the place of management is located in Germany, who acquired property of the character, specified in paragraph 2, in another way than by written permission of the foreign exchange agency or who acquire the property under such permit but whose permit has subsequently become ineffective, shall

within three days from the acquisition or other origination of the obligation offer, and upon demand sell and transfer such property to the locally competent Reichsbank office (either direct or through the agency of a foreign exchange bank) * * *.

(2) The obligation under paragraph (1) relates to the following properties:

1. Means of foreign exchange [coin, currency, commercial paper, etc.] and credits [claims] in foreign currency.

2. * * *.

§ 3

(1) If under §§ 1 and 2 properties which have not yet matured [obligations] are offered to the Reichsbank, the Reichsbank may for the time being waive the demand of immediate transfer and may request the obligated party to cause the properties to be payable at the first possible date. In that event the obligated party shall upon maturity offer and upon demand sell and transfer the proceeds received in foreign currency to the Reichsbank. Should the proceeds be received in domestic [German] currency, it has to be registered with the Reichsbank within three days * * *.

(2) If the Reichsbank or foreign exchange bank should be unwilling to purchase the properties offered under §§ 1 and 2, it may sell the properties or cause them to be sold in a foreign country for account of the obligated party. The proceeds of the sale shall take the place of the original properties. If the Reichsbank should not avail itself of this right, the obligated party shall be entitled, within the limits of the law, to look for some other

possibility of disposal of the properties. In the event that the obligated party does not dispose of them, it shall offer for collection and upon demand transfer the properties to the locally competent Reichsbank agency (either direct or through the agency of a foreign exchange bank) in sufficient time that in the ordinary course of business the proper collection can be assured. The claim of the obligated party to the payment of equivalent reichsmarks shall be governed, in cases dealt with in this paragraph, by the general business statutes of the Reichsbank. * * *

From the obligations of § 1, paragraph (1), the following are exempted:

1. Persons who, subject to reciprocity, under general international law principles are entitled to exemption for personal taxes.

2. Consular agents who are civil service by provision, and officials placed under authority provided they are citizens of the country which they represent, do not possess German nationality and, outside their office or service in Germany, do not carry on a trade or other profit-yielding activity.

(1) The Reichsbank may direct that certain classes of the properties specified in § 1, paragraph 2, need not be offered. It can delegate to other agencies the decisions reserved to it by § 36 of the Foreign Exchange Decree.

(2) The Reichsbank may require the obligated party to furnish to it regular specifications of the use of the properties of the character specified in § 1, paragraph 2, acquired within a certain period.

U. S. GOVERNMENT PRINTING OFFICE: 1938

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In the Supreme Court of the United States

OCTOBER TERM, 1936

No. 254

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES, Petitioners,

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR THE PETITIONERS

The brief on behalf of respondent contains several statements to which we desire to reply.

I.

RESPONDENT HAS NOT SHOWN THAT ARTICLE I, SECTION 9, CLAUSE 7 OF THE CONSTITUTION IS INAPPLICABLE TO THE MONIES HERE INVOLVED.

In Part A of Point I we stated (pp. 15-16) that this Court "has frequently decided that no judgment or decree of any court can compel the payment of money from the Treasury unless there has been an authorization by Congress," and that "with respect to money which has been deposited in the Treasury of the United States pursuant to Section 12 of the Trading with the Enemy Act, we believe there can be no serious question of the power of Congress to enact such a prohibition" as that contained in Public Resolution 53. In reply, respondent asserts (Brief, p. 31):

> We think it too clear for extended argument that, from the entire purpose and intent of the Act, from the provisions thereof, from the long-continued practice thereunder in which hundreds of millions have been paid out without appropriations, and from the decision of this and other Courts, the monies here involved were not intended to be and have not been covered into the Treasury and are not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution.

It may be admitted that the monies here involved have not been technically "covered into the Treasury." However, it does not follow that the monies are not subject to the appropriation clause of the Constitution. Respondent's argument is erroneous in two major respects. First, this Court has not held, as asserted by respondent (Brief, p. 28), that money not technically covered into the Treasury is not subject to the appro-

priation section of the Constitution. *United States* v. *Johnson,* 124 U. S. 236, upon which respondent relies, is not in point here. The question before the Court in that case was whether the Secretary of the Treasury had authority under certain acts of Congress to settle the accounts of Treasury agents, or whether the auditors at the Treasury could overrule decisions of the Secretary. While it is true that the appropriation provision of the Constitution is mentioned by the Court of Claims in its opinion quoted by this Court, no constitutional question of the power of Congress over money in the Treasury was actually involved. At least it is clear that the Court did not hold ineffective an express command by Congress that money in the Treasury should not be disbursed.

Second, it cannot be asserted that with respect to property held under the Trading with the Enemy Act "hundreds of millions have been paid out without appropriations". By Section 12 of that Act, Congress specifically authorized the disbursements in the following language:

> That on order of the President as set forth in section nine hereof, or of the court, as set forth in sections nine and ten hereof, the alien property custodian or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court:

II.

THE CASES RELIED UPON BY RESPONDENT DO NOT SHOW THAT THE RETURN OF ENEMY PROPERTY UNDER THE SETTLEMENT OF WAR CLAIMS ACT IS NOT AN ACT OF GRACE.

Respondent asserts that under the Trading with the Enemy Act "only control, not interest of the owners, was for the time being divested" (Brief, p. 64). *Commissioner of Internal Revenue* v. *Stearns,* 65 F. (2d) 371 (C. C. A. 2d) is cited in support of this assertion. We submit that the *Stearns* case is not contrary to the decisions of this and other courts cited by petitioners at page 32 of their brief.

In that case certain stocks and bonds had been returned by the Alien Property Custodian to the administrator of a German who had died during the period that the property was held by the Custodian. The administrator sold the property and computed his taxable profit upon the value of the property at the time it was received by him. The Commissioner assessed the administrator for a profit based upon the value at the time of the testator's death. The court upheld the action of the Commissioner, stating that, despite the seizure and admitted transfer of title to the Custodian, the former owner retained some "interest" which passed to his administrator. In addition, the court pointed out that since Section 24(b) of the Trading with the Enemy Act directed the Custodian to pay all income and estate taxes falling due upon property in his hands, and since, had the Custodian sold the property, the tax base would have been fixed as of the date of the death of the decedent, no reason could be found for concluding that Congress intended the use of a

different tax base in the event that the property was sold by an administrator after the Custodian had returned it.

Respondent also cites *Williams* v. *Heard,* 140 U. S. 529, in support of a contention that recognition of an international obligation is not an act of grace. Aside from the fact that the return of property authorized by the Settlement of War Claims Act was not in recognition of any international obligation, the case is clearly distinguishable. There the United States had received a sum of money from Great Britain as an indemnity for losses sustained by American citizens through acts of British cruisers. Thereafter the United States made provision for the distribution of this fund. Certain of the individuals who had suffered losses had become bankrupt prior to the distribution. The Court held that the payment should be made to the assignees in bankruptcy because the original claim was to be considered as part of the "estate, debts and effects" of the bankrupts within the meaning of the bankruptcy statute. The Court pointed out that the distribution of this money was not merely a gratuity in the sense that it was purely personal to the individual who had suffered the loss and which would therefore not pass to his estate in bankruptcy. But that it was an act of grace on the part of Congress to provide for the distribution of this fund was clearly pointed out (pp. 537-538):

> True, as citizens of the United States had suffered in person and property by reason of the acts of the Confederate cruisers, and as justice demanded that such losses should be made good by the government of Great Britain, the most natural disposition of the fund that could be made by Congress was in the payment of such losses. *But no*

individual claimant had, as a matter of strict legal or equitable right, any lien upon the fund awarded, nor was Congress under any legal or equitable obligation to pay any claim out of the proceeds of that fund. (Italics supplied.)

In other words, whether the benefits of any particular act of grace on the part of Congress pass to a beneficiary's heirs or to a beneficiary's estate in bankruptcy or fail altogether on the beneficiary's death are questions which depend for their answer upon the nature of the particular benefit involved. Problems of that sort have no bearing upon the question whether Congress may in its discretion alter, modify or repeal a gratuity.

III.

THE SETTLEMENT OF WAR CLAIMS ACT WAS NOT A RECOGNITION THAT GERMANY HAD MADE SUITABLE PROVISION FOR THE SATISFACTION OF AMERICAN CLAIMS.

Respondent's argument with respect to the Settlement of War Claims Act is based on two false assumptions. First, respondent states that "the United States solemnly agreed in the Treaty of Berlin to release the property when Germany made 'suitable provision' for the settlement of American claims" (Brief, p. 69). Second, respondent argues that "Congress by the Settlement of War Claims Act * * * determined definitely and conclusively that suitable arrangements had been made" by Germany (Brief, p. 18).

The first contention is obviously untenable. The phrase "suitable provision" is found only in Section 5 of the Peace Resolution of July 2, 1921 (Appendix, petitioners' brief, pp. 64-65). A mere reading of that section demonstrates that it constituted simply a dec-

laration by Congress of its policy with respect to seized German property, and was not in any sense a promise or an offer to Germany. Section 5 was in turn embodied in the preamble of the Treaty of Berlin (Appendix, petitioners' brief, pp. 68-70), but the Treaty also contained no promise by the United States to restore the seized property if and when the German Government should make suitable provision for the satisfaction of American claims.

Upon the assumption that the Treaty of Berlin contained a promise by the United States to return all seized property upon Germany's making "suitable provision" for payment of American claims, respondent argues that the Settlement of War Claims Act was a conclusive determination by Congress that Germany had made such a provision. Respondent does not, however, point out when and by what acts the German Government had made the suitable provision. Respondent states (Brief, p. 22) that "the first step in such suitable provision was the Mixed Claims Agreement of 1922." However, the Mixed Claims Agreement was merely a means of ascertaining the exact amount for which Germany was already admittedly liable under its previous promise to pay as contained in the Treaty. The Agreement did not add to or qualify Germany's liability and is devoid of any provision looking toward payment.

Respondent also points to the Winslow Act of March 4, 1923 (petitioners' brief, p. 11, note 3), as a recognition by Congress of "satisfactory progress" of suitable arrangements by Germany (Brief, p. 22). Again respondent fails to show any acts by Germany to substantiate that progress.

Actually, the reports of the Committees of Congress quoted by respondent (Brief, p. 46) show affirmatively

that Congress, in considering the Settlement of War Claims Act, realized that Germany had not yet made "suitable provision." After the Committee on Finance stated that "the United States unquestionably possesses the right to retain this property until Germany has made suitable provision," the Committee set forth the reasons why, in its opinion, the Congress should appropriate money and adopt other measures to compensate for Germany's *failure to make the suitable provision* in question. Otherwise, it pointed out, payments to American claimants would be unreasonably delayed. If, as respondent states (Brief, p. 50), "the clear intent, purpose and expression of the committee was that the provisions which had been made for the payment of American nationals were suitable," the provisions were those of the American Congress and not those of Germany.[1]

IV.

THE POWER OF THE UNITED STATES TO CONTROL THE DISPOSITION OF SEIZED ENEMY PROPERTY WAS NOT AFFECTED BY THE DEBT FUNDING AGREEMENT OF 1930.

Inasmuch as respondent relies upon a supposed definitive disposition of German property by the Settlement of War Claims Act, it is not altogether clear what importance it accords to the Debt Funding Agreement

[1] Respondent infers (Brief, pp. 46, 51) that the cooperation between the representatives of the American claimants and the German claimants in representations to committees of Congress evidences in some undefined manner that Germany had made "suitable provision" for the satisfaction of American claims. However, this cooperation is clearly without legal effect. It constituted neither a contract between the conflicting interests nor one by the United States. The failure of the American claimants to ask Congress that all German property be retained, or that a larger percentage be retained, to protect their interests cannot be deemed an act by the German Government providing for satisfaction of American claims.

of 1930. Apparently, however, respondent argues that that Agreement embodied an additional covenant on the part of the United States to release German property (Brief, p. 98), and that by the so-called security clause the United States renounced its lien upon seized German property,—a lien which had theretofore been carefully preserved in order to safeguard the interests of American claimants.[2]

We believe that respondent's argument is directly opposed to the language of the Agreement and the notes exchanged in connection with it as we have already pointed out in our brief in chief at pages 44-45. Moreover, respondent's construction of the Agreement completely ignores its history, which may be consulted to determine its true meaning. *Cook* v. *United States,* 288 U. S. 102; *Factor* v. *Laubenheimer,* 290 U. S. 276, 295.

The Debt Funding Agreement of 1930 was negotiated in connection with the adoption of the Young Plan by Germany and the governments to which reparations were payable by Germany under the Treaty of Versailles. The subject matter of the Agreement was the payment by Germany of the awards of the Mixed Claims Commission and of its obligations for the costs of the American Army of Occupation.

The first draft agreement contained no security clause. During the negotiations the German representatives suggested that in view of the correlation of the Agreement with the other agreements to be negotiated by Germany with creditor powers, it would be desirable

[2] It may here be noted that the petitioners asserted in their brief (p. 28) that they "are advised by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties." The respondent questioned this statement (Brief, p. 94). Therefore, printed as an Appendix to the present brief is a communication received from the State Department which supports the petitioners' statement.

to include in the Agreement a clause renouncing the sanctions and controls to which the United States might be entitled. In this the German representatives had principally in mind that the German government attached great importance to obtaining from their reparations creditors a formal treaty renunciation of their right under the Treaty of Versailles to impose sanctions in case of voluntary default by Germany on reparation payments under Paragraph 18 of Annex II to Part VIII of the Treaty of Versailles and of their right under Articles 428-430 of Part XIV of the Treaty to occupy territory west of the Rhine "as a guarantee for the execution of the present treaty." There was no indication in the German suggestion that the security clause should in any way affect the disposal by the United States of German property held under the Trading with the Enemy Act.

In reply to the suggestion, the American Government stated in effect that it did not desire to include in a financial agreement a clause which would be more appropriate in a political agreement. Paragraph IV of the Agreement as explained by Paragraphs (a) and (b) of the Exchange of Notes is the result of the compromise of these two views.

The proviso of Paragraph (b) of the Notes did not arise from any reference by the German representatives to seized German property in the United States. There is no indication in the diplomatic history of the negotiations in the records of the State Department that the German representatives ever referred to the seized property. The exchange of notes was, therefore, designed to make clear that the security clause in the Debt Agreement was not intended to affect the powers of Congress with respect to this seized property.

V.

ANY RIGHTS ACQUIRED BY RESPONDENT WERE SUBJECT TO THE PARAMOUNT POWER OF THE UNITED STATES IN THE FIELD OF FOREIGN RELATIONS.

In Point III, subsection B of our original brief we pointed out that if respondent acquired any "contract" right to the return of the property here in question, that contract right must be understood as subject to the implied right of the United States to take action under treaties and statutes then in existence. We also (pp. 45-47) indicated that the so-called contract should be understood to reserve to the United States its sovereign powers in international relations. However, in view of the contentions of the respondent, it may be well to indicate in somewhat more detail the basis for the power of the United States to take measures of this character under international law.

The failure by one nation to meet its international obligations acknowledged to be owing by it to another nation is an international situation which has existed on numerous occasions. In international law, the right to take measures to induce redress by the neglectful nation is well-recognized. A creditor nation may even seize property of a defaulting debtor nation, or of its citizens, hold such property until the debt is paid, or apply the property in satisfaction of the debt if the debtor nation persists in its refusal to pay.[3]

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[3] See Moore, *Digest*, Vol. VII, pp. 119-135; Hallock, *International Law*, Vol. I, p. 503, *et seq.*; Wheaton, *International Law* (Keith Ed., 1929), Vol. II, pp. 623-627; Oppenheim, *International Law* (5th Ed., 1935), Vol. II, pp. 114-123. Hyde, *International Law Chiefly as Interpreted and Applied by the United States*, Vol. II, pp. 174-175 states:

> ¶590. THE PRACTICE OF THE UNITED STATES.
>
> The nature and use of reprisals early engaged the thought of American statesmen. Attention was, however, drawn to the policy rather than the rightfulness of such acts. • • •
>
> By reason of the failure of the French Chamber of Deputies

Many illustrations of the exercise of this power by other governments may be cited. One of the most conspicuous examples of the use of these tactics is afforded by the action taken by England in 1934 when Germany announced a moratorium on the service of bonds held abroad. England in retaliation passed legislation enabling her treasury to collect all sums due from British debtors to creditors in defaulting countries and to use these proceeds to satisfy the claims of the British creditors against the defaulting foreign debtors.[4] The result of this legislation was that Germany became willing to negotiate, and agreements between the two governments were finally reached.[5] Unilateral action under this legislation actually was taken against Italy. See Order of July 10, 1936, Statutes, Rules, and Orders 1936, No. 696 (discussed, Board of Trade Journal, Nov. 19, 1936). Switzerland also has used the same expedient. See Act of October 14, 1933, Eidgenossische

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to make the necessary appropriation for the payment to the United States of the first installment, some time overdue, in settlement of the French spoliation claims, in accordance with the terms of the convention of July 4, 1831, President Jackson, in his annual message of December 1, 1834, expressed the opinion that the United States should insist upon prompt execution of the treaty, and in case of a refusal or longer delay on the part of France, should "take redress into their own hands." He declared it to be "a well-settled principle of the international code that where one nation owes another a liquidated debt, which it refuses or neglects to pay, the aggrieved party may seize on the property belonging to the other, its citizens or subjects, sufficient to pay the debt, without giving just cause of war." (Footnotes omitted.)

[4] Law Reports, Statutes, 73, Geo. V. 24-24, 1933-1934, Chap. 31, p. 286.

[5] Anglo-German Transfer Agreement July 4, 1934, British Treaty Series, Cmd. 4640, Germany #2, 1934 (Described in Economist, July 7, 1934, pp. 8-9, Statist July 7, 1934, p. 7); Anglo-German Exchange Agreement, Aug. 10, 1934, British Treaty Series, Cmd. 4675 (Described in Economist, Aug. 11, 1934, pp. 263-4, Statist, Aug. 11, 1934, p. 199, and Aug. 18, 1934, pp. 221-2); Anglo-German Payments Agreement, Nov. 1, 1934, British Treaty Series, Cmd. 4726, Germany #26, 1935 (Discussed in Economist, Nov. 3, 1934, p. 824).

Gesetzsammlung 1933, pp. 811-813, Art. 3; and unilateral decrees against Poland (July 14, 1936), against Spain (July 31, 1936) reprinted in Schweizerisches Handelsamtsblatt July 14, 1936, August 1, 1936. Germany itself has passed a law concerning the application of economic measures against foreign countries, Act of July 4, 1934, Reichsgesetzblatt, Part I, No. 74. See also, Belgium: Act of August 8, 1932, Moniteur Belge, August 20, 1932, page 4534, and decree of August 19, 1933, Moniteur Belge, August 21, 1933, pages 4243-4.

The United States, in common with other members of the family of nations, possesses the right and power of self-help. It has been stated by this Court that the exercise of power over international relations "cannot be hampered, when needed for the public good, by any considerations of private interests." *Chae Chan Ping* v. *United States,* 130 U. S. 581, 609. *Cf. United States* v. *Schooner Peggy,* 1 Cranch 103, 109. The conception of a national government which, when faced with defaults upon intergovernmental obligations or discriminations against American creditors, is powerless to act, finds no sanction in the opinions of this Court. As stated by Mr. Justice Sutherland, speaking for the court in *United States* v. *Curtiss-Wright Export Corp.,* No. 98, decided December 21, 1936:

> As a member of the family of nations, the right and power of the United States in that field are equal to the right and power of the other members of the international family. Otherwise, the United States is not completely sovereign.

The measures taken by the United States in the present case fall far short of the measures which other nations have seen fit to adopt to compel nations to ful-

fill their obligations,[6] and for the purposes of the present case it is quite unnecessary to consider the extent of the power of the United States in this direction. Here it is necessary only to point out that the existence of this power must be considered as qualifying any contract rights which respondent claims. Moreover, the property is still in the possession of the United States. It has been the subject of long continued international negotiations. Under the Treaty of Berlin, the property has been, in a sense, dedicated to the satisfaction of the obligations of the German Government. Under these circumstances, it is difficult to understand how any claimed rights of respondent with respect to

[6] When the Joint Resolution was introduced into the Senate the following statements were made by Senators Johnson and Harrison: MR. JOHNSON. It is a reprisal for the failure of Germany to pay Germany's obligation to the Government. MR. HARRISON. I would not say it is a reprisal, but it is because of the failure of Germany to live up to her agreement in providing funds under the agreement that it is proposed that we withhold any payment to German nationals until after compliance shall have been made by Germany. MR. JOHNSON. With which, Mr. President, I may say I am quite in sympathy. I have observed today the attitude of Great Britain regarding the debts due from Germany to Britain and to British interests, and I am astonished to see, Mr. President, that Great Britain, resenting as she does even the request on the part of this Government for the payment of a debt, is about to engage in real reprisals against Germany because Germany does not pay her debt to Britain, and I am more surprised, sir, to observe that the great internationalist newspapers of this country, which have viewed with such alarm and with such dread and with such hostility a measure which precluded the sale in this country of securities of nations which were in default to our Government, view with equanimity and approval Great Britain's action in reference to Germany's debt. What a marvelous difference it makes whose ox is gored, Mr. President! (Congressional Record of June 16, 1934, p. 12067.)

this property can be said to be *private* property such as the Fifth Amendment is intended to protect.

Respectfully submitted,

STANLEY REED,
Solicitor General.

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Assistant Attorney General.

HARRY LEROY JONES,
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January, 1937.

APPENDIX

DEPARTMENT OF STATE
Washington

Address official communications to
The Secretary of State
Washington, D. C.

December 16, 1936.

In reply refer to
Le 311.6253 Deutsche
Bank und Disconto-
Gesellschaft/10

My dear Mr. Attorney General:

Reference is made to a letter from your Department of November 10, 1936, regarding the preparation of the argument on behalf of the United States before the Supreme Court in the case of Cummings and Julian v. Deutsche Bank und Disconto Gesellschaft involving the constitutionality of Public Resolution No. 53 of the 73rd Congress.

In response to the inquiry if any protest has been received from the German Government concerning Public Resolution No. 53 of the 73rd Congress, you are informed that the Department's records show that the German Ambassador called on the Secretary of State on June 14, 1934, and orally complained about the bill introduced in the Senate by Senator Harrison and in the House by Representative Doughton, which was later passed as Public Resolution No. 53, 73rd Congress, and approved on June 27, 1934.

Subsequent to receiving this general oral complaint, which was prior to the enactment of the Resolution,

this Department has not received any written communication from the German Government advancing reasons for its protest of a legal character or otherwise.

Sincerely yours,

(Signed) R. WALTON MOORE,
Acting Secretary.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States, *Petitioners*, *v.* DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.	No. 254

BRIEF FOR PLAINTIFF-RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

OPINIONS BELOW

The memorandum opinion of the Supreme Court of the District of Columbia is not reported (R. 8). The opinion of the United States Court of Appeals for the District of Columbia, per Groner, *J.* (R. 13), and the subsequent *per curiam* opinion on motion for rehearing (R. 26) are reported in 83 F. (2d) 554, 562.

JURISDICTION

The opinion of the United States Court of Appeals for the District of Columbia was rendered February 17, 1936.

On motion for rehearing a *per curiam* opinion was rendered on May 4, 1936. The jurisdiction of this Court is invoked under the provisions of Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

STATUTE INVOLVED

Public Resolution No. 53, 73rd Congress (48 Stat. 1267, 1268, 1269), a full text of which is annexed hereto and marked Appendix A, provides in part as follows:

> "*Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,* That so long as Germany is in arrears in any payments of principal or interest: * * * under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, *all payments,* conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof *authorized or directed* to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved. * * * *Provided, further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution." (Italics ours.)

The Treaty of Berlin is in no way involved herein.

QUESTIONS PRESENTED

1. Whether Public Resolution No. 53 operated as a withdrawal by Congress of the right of owners of property to sue for its recovery as provided by Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

2. Whether, upon filing its consent as the German owner to the retention of and use by the United States Government of 20% of its property, the plaintiff did not acquire under the Settlement of War Claims Act of 1928 a vested right which could not be affected by the subsequent passage of Public Resolution No. 53 postponing the return of said property until Germany shall comply with the debt-funding agreement of 1930 (Annual Report of Secretary of Treasury 1930, p. 341).

3. Whether Congress by vesting arbitrary discretion in the President wholly or partially to nullify Public Resolution No. 53 at his own will by returning property to some owners under the Act and refusing to return to others, unlawfully delegated its legislative power to the President.

STATEMENT

The action is brought under the express authorization of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 (45 Stat. 254), which directed that there be returned to every German 80% of his or its property which had been seized under the Trading with the Enemy Act (40 Stat. 411), provided he filed a consent to the retention and use by the United States of the remaining 20% of said property. The pertinent sections of the Trading with the Enemy Act as amended by

the Settlement of War Claims Act are set forth in Appendix B.

Plaintiff is a corporation organized and existing under the laws of Germany (R. 2) and its property was seized by the Custodian pursuant to the terms of the Trading with the Enemy Act (R. 3).

Subsequent to the passage of the Settlement of War Claims Act of 1928, plaintiff filed its notice of claim with said Custodian together with the consent to the retention and use by the United States of 20% of its property (R. 3). The return of its property was delayed owing to a warrant of attachment filed in the Supreme Court of the District of Columbia, which was dismissed by a decree of that Court, dated May 23, 1934 (R. 4). Upon said dismissal plaintiff demanded the return to it of 80% of its property (R. 3), but actual payment thereof was withheld until after the enactment of Public Resolution No. 53, 73rd Congress, approved June 27, 1934 (48 Stat. 1267), when defendants set up said Public Resolution as an authorization for the withholding from plaintiff of its property although prior to the enactment of said Public Resolution 53 the Custodian had determined plaintiff was the owner of said property and entitled to the return thereof as provided for by the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 (R. 4). Thereupon plaintiff instituted the present suit.

Defendants subsequently moved to dismiss the complaint (R. 7). This Motion to Dismiss was based upon Public Resolution No. 53, 73rd Congress, it being claimed that the return of the property of plaintiff, as prayed for in the Bill of Complaint, was, by virtue of said Resolution, prohibited (R. 7).

The text of the Resolution appears in the Appendix A, hereto, but its general purport is to the effect that because

the German Government is indebted to the United States under a debt-funding agreement between Germany and the United States, dated June 23, 1930, no further returns to individual Germans shall be made under the Settlement of War Claims Act until such time as the German Government shall have paid the amount it is in arrears under such debt-funding agreement of June 23, 1930, and

> "Provided further, That the President may in his sole discretion remove the restriction as to any of the cases or classes of cases * * *,"

and that his determination as to Germany being in arrears

> "shall not be subject to judicial review".

Prior to the enactment of Public Resolution 53, approximately 95% of the property taken by the Alien Property Custodian under the Trading with the Enemy Act had been, under the provisions of the Settlement of War Claims Act of 1928, returned to its former owners of the same class as Deutsche Bank und Disconto-Gesellschaft (R. 16).

REASONS FOR DENYING THE WRIT

i. In view of the fact that prior to the enactment of Public Resolution No. 53, 73rd Congress, out of $400,000,000 worth of property seized and returnable under prior Acts, 95% thereof had already been returned, the questions herein involved are not of such general importance as to warrant the granting of a writ of certiorari.

ii. In view of the fact that Public Resolution No. 53 purporting to withhold property Congress had already ordered returned is clearly in violation of the Fifth Amendment of the Constitution, no question of substance is involved.

iii. The Court below has given proper effect to the applicable decisions of this Court.

All three of the questions suggested (Petition, pp. 4, 5) are confined to this particular Resolution and do not present any broad or general questions of law of even the slightest importance. The statute is so completely *sui generis* that it is utterly without precedent in the history of the United States, and, moreover, is not likely to find any counterpart in any law that may be passed during, as the result of, or after any future war in which the United States may become engaged. It cannot even be urged, therefore, that a decision herein will enrich the body of the law relating to war.

The first question is, in its essence, whether the particular language of this Resolution withdraws the right of the United States to be sued. What possible importance upon the body of the law can the mere interpretation of this particular statute have?

The Treaty of Berlin to which the second question refers, is, as hereinafter pointed out, not involved herein. That treaty simply recognized the power of the United States to deal with the seized property—a power which existed fully without the treaty, and as part of the inherent right of our Government.

This case deals with the right of the United States to renounce its power of confiscation, and thereafter to cancel the renunciation as to some Germans while allowing it to remain in force as to all the others. But it is clear that, in the solution of this question, the law of the United States is itself involved and not in any way the treaty.

The third question—whether the Settlement of War Claims Act conferred vested rights on the Germans—would

seem to be largely academic, in view of the fact that approximately $380,000,000 has been returned to them. If the rights of those Germans whose property was returned were vested, how can those entitled to the remaining $20,000,000 possibly have been any less so? And if such rights were vested, how can the question even be suggested, as in the second part of Question 3, whether the unlimited postponement of the return of one's property to await an event that may never happen (Germany's payment of its debt to the United States) is a deprivation of his vested rights thereto.

The quotation of the lower court's statement that "The question is of great importance" might be applied to thousands of cases in which this Court has denied certiorari, because the alleged importance was not of the type required for review by it.

POINT I.

IN VIEW OF THE ABSENCE OF ANY APT LANGUAGE IN PUBLIC RESOLUTION NO. 53 WITHDRAWING FROM THE FORMER OWNERS THE PRIVILEGE OF SUING THE UNITED STATES FOR THE RETURN OF THEIR PROPERTY AS PROVIDED FOR BY SECTION 9 OF THE TRADING WITH THE ENEMY ACT AS AMENDED BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928, THE CONSENT OF THE UNITED STATES TO BE SUED HAS NOT BEEN WITHDRAWN.

In *Lynch* v. *United States,* 292 U. S. 571, this Court held that in order to deprive a war risk insurance claimant of the privilege granted to him of suing the United States for breach of an insurance contract made by the United

States with him, clear language denying him such privilege must appear in the law.

Public Resolution No. 53 contains no language forbidding the maintenance of suits.

In *Woodson* v. *Deutsche G. und S. Scheideanstalt*, 292 U. S. 449, 54 S. Ct. 804, this Court had before it the Independent Offices Appropriation Act for 1935 expressly providing with respect to the 2% tax to cover expenses as follows (48 Stat. 509, 510):

> "* * * nor shall any suit be instituted or maintained against the Alien Property Custodian * * *"

Under such circumstances, this Court was bound to declare that the suit to recover these expenses could not be maintained.

In *District of Columbia* v. *Eslin*, 183 U. S. 62, 22 Sup. Ct. 17, the plaintiffs, contractors with the District of Columbia, were awarded under an act of Congress of February 13, 1895 (28 Stat. 664) certain rates of compensation established by the board of public works. These were gratuities awarded by Congress. Subsequently, Congress passed the act of March 3d, 1897, chap. 387, providing that the act of February 13, 1895, allowing the aforesaid rates,

> "be, and the same is hereby repealed, and *all proceedings pending shall be vacated*, and no judgment heretofore rendered in pursuance of said act shall be paid." 29 Stat. 665, 669. (Italics ours.)

The same Statute was construed in *In re Hall*, 167 U. S. 38, 17 Sup. Ct. 723, where the court said (p. 725):

> "This Court had just decided that the act of February 13, 1895 (28 Stat. 644), simply conferred a gratuity upon the persons covered by its provi-

> sions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the court of claims to proceed further, so far as concerned any rights founded upon the act so repealed."

To suggest that the Congressional return of property to its lawful owners is a gift or gratuity which once effected, may be recalled at pleasure, seems preposterous.

POINT II.

THE SETTLEMENT OF WAR CLAIMS ACT OF 1928 BEING A FINAL DISPOSITION OF THE CLAIMS OF FORMER GERMAN OWNERS, WHEN ITS TERMS WERE ACCEPTED BY SAID OWNERS, CREATED VESTED RIGHTS PROTECTED BY THE CONSTITUTION AND OF WHICH THEY CANNOT BE DEPRIVED BY SUBSEQUENT LEGISLATION OF CONGRESS.

There is no doubt that in accordance with the doctrine of *Chemical Foundation* v. *United States,* 272 U. S. 1, and *Woodson* v. *Deutsche G. und S. Scheideanstalt,* 292 U. S. 449, Congress had full power of disposition over the property taken from its former German owners. But, as demonstrated in the opinion below, from the time of its enactment, the Trading with the Enemy Act recognized, in Section 12, that after the end of the war any claim of any enemy to recover money or property received and held by the Custodian or deposited in the United States Treasury "shall be settled as Congress shall direct". 40 Stat. 424.

As to the *Chemical Foundation* case, Senate Report No. 273, 70th Congress, 1st Session, states as follows (p. 13):

> "So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the *Chemical Foundation* case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation".

To the same effect, see Senate Report No. 113, 65th Congress, 1st Session and House Report No. 17, 70th Congress, 1st Session.

After the war Congress had by various acts provided for the return of property to enemy owners. 41 Stat. 977; 42 Stat. 1511. Then, by the Settlement of War Claims Act of 1928, 45 Stat. 254, Congress provided for the absolute return of 80% of the property and the temporary retention of 20% thereof. And, by said Act, Congress definitely and finally recognized the rights of the former owners in the property and the Congressional disposition contemplated by Section 12 of the Trading with the Enemy Act intending to vest full rights of ownership in such former owners became effective. This definite and expressed intention of Congress is evidenced by many expressions in the Act, among which are the following:

> (a) Requirement of consent to the temporary retention of 20% (subdivision (m) of Section 9). None but the owner could so consent.
>
> (b) Authorization to the Custodian to withdraw outstanding demands for enemy property upon receiving 20% thereof (Sections 29 (a), 29 (b)), thus relinquishing *even the seizure* of the 80%.
>
> (c) The payment of taxes upon seized property *"as though" it "had not been seized"*. (Section 24.) So it was regarded as a cancellation of even the seizure. And the taxes could not be paid to the

United States if any of the property still belonged to it.

(d) References to the former enemy as the person *"entitled"* thereto or *"owner"* (subdivisions m. and p. of Section 9; Section 25 (e), subdivision 2; Section 26 (b), subsections (d), (g), (j) of Section 9).

(e) That the enemy may receive its entire property if, to avoid a sale thereof, he pays 20% to the Custodian (subsection m. of Section 9). *To permit him to pay 20% without giving him the property would constitute a positive fraud by the United States.*

(f) Even the full income from March 4, 1923 was directed to be paid the former enemy out of property "held in trust for such person" (Section 23), as well as his proportion of the unallocated Treasury interest (Sections 26a, b, c).

(g) Section 25 (e), added to the Trading with the Enemy Act by Section 10 of the Settlement of War Claims Act, provides for the issuance to the Custodian of 5% interest bearing certificates representing the 20% deductions, and also non-interest bearing certificates representing the claimants' interest in the so-called unallocated interest fund, which certificates, according to Section 25 (e), subdivision (2), shall be transferable.

The Act provides that upon the filing of a notice of claim and a consent to the retention and use by the United States of 20% of the property, the remaining 80% should be returned to the owner. The Deutsche Bank und Disconto Gesellschaft filed such claim and consent and is entitled to the return of 80% under the provisions of the Act. In complying with the Statute, the Deutsche Bank

und Disconto Gesellschaft obtained vested rights to 80% of the property of which it cannot be deprived (*S. S. Company* v. *Joliffe,* 2 Wall. 450; *Ettor* v. *Tacoma,* 228 U. S. 148; *Coombes* v. *Getz,* 285 U. S. 434).

No question of a gratuity is here involved and hence there is and can be no question of the lack of a vested right in a gratuity. The property was seized from German owners; it could have been, but never was, confiscated; it never was intended that it should be confiscated but was to be held subject to disposition by Congress; Congress, by the Settlement of War Claims Act, directed the return of 80% thereof to the owners upon the owners' consent to the retention and use by the United States of the remaining 20%. Since the property was once subject to confiscation, it may be said that the return was an "act of grace" but in no sense can the return of property to the owners thereof be said to be a "gratuity". And certain it is that if, in any sense, this claim can be said to be merely of "an equitable, moral, or honorary nature", then, it is, in the circumstances existing, a claim which is enforcible and which could not be denied by Public Resolution 53. (*United States* v. *Realty Company,* 163 U. S. 427).

The Treaty of Berlin (42 Stat. 1939) is utterly immaterial.

The Treaty of Berlin recognizes, of course, that the Congress had the privilege of confiscation.

No one disputes that Congress had the privilege of confiscation, but it did not exercise it. It ordered the property returned, and the return of the property is in no way inconsistent with the Treaty.

After the property had been once returned, it could not be reseized except under a due observance of the

Constitution of the United States, especially in view of the fact that the present Treaty with Germany (44 Stat. 2132) contains the following language:

> "The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

The case of *Woodson* v. *Deutsche G. und S. Scheideanstalt*, 292 U. S. 449, does not hold that Congress did not intend to vest title in the former German owners, but simply that Congress made certain reservations with reference to the payment of expenses, not only in the original Trading with the Enemy Act, but in subsequent acts—in the Act of March 4, 1923, as well as in the Act of May 16, 1928—and therefore held that as to the 2% retained for expenses there was no vested right infringed.

In the *Woodson* case this Court said as follows (p. 454):

> "The original act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, *as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.* The funds here in question are proceeds which were deducted for that purpose *when payments were made from time to time to the enemy owner.* As respects

> property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses . This is in effect what was done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and *in such circumstances* does not deprive the respondent of any *vested* interest" (Italics ours).

It is only with respect to the reservations made by Congress that this Court held there was no vested interest.

To use the language of the case *In re Munster,* 36 Times L. R. (1920) 173, until further legislation, the beneficial ownership "was only in a state of suspense until an Order in Council dealing with it was made", but when legislation was once passed recognizing the right of the former owner, the rights of the former owner were revived and could not be obliterated after such revival.

There can be no difference between an owner whose rights to such return are recognized immediately after the passage of the Settlement of War Claims Act and one whose return is delayed by an attachment in a suit which is subsequently dismissed.

It is submitted that the decision of the lower court is clearly and unmistakably correct. As the lower court stated (R. 29):

> "the effect of the War Claims Act, when its terms were accepted by appellant, created vested rights in appellant protected by the Constitution, * * *"

and again (R. 30):

> "With the seizure went the declaration that the return would be subject to such conditions as Congress might apply. Several years after the close of the war, and after a formal treaty of peace, Congress named the conditions, and appellant, as is admitted, conformed to those conditions in every respect. By the ordinary rules of contract there was then a meeting of minds, and the rights which appellant asserts in this suit became fixed and vested".

POINT III.

PUBLIC RESOLUTION NO. 53, INVOLVING COMPLETE DELEGATION OF LEGISLATIVE POWERS BY CONGRESS TO THE PRESIDENT, FALLS DIRECTLY WITHIN THE CONDEMNATION OF *PANAMA REFINING CO.* v. *RYAN*, 293 U. S. 388, 55 S. CT. 241, AND *SCHECHTER* v. *UNITED STATES*, 295 U. S. 495, 55 S. CT. 837.

Public Resolution No. 53 gives the President the most uncontrolled discretion, without even attempting to prescribe any criterion or basis for its exercise, viz:

> "Provided, further, that the President may, IN HIS SOLE DISCRETION, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers or deliveries have been postponed." (Italics ours.)

Could discretion possibly be wider than to thus empower him, without any reason whatsoever, to return the property of one individual, yet retain that of another in the same situation exactly?

To use the language of Judge Cardozo in the *Schechter* case, 295 U. S. 495, 553:

"This is delegation running riot."

POINT IV.

THE PETITION FOR WRIT OF CERTIORARI SHOULD BE DENIED.

Respectfully submitted,

OTTO C. SOMMERICH,
THOMAS H. CREIGHTON, JR.,
JAMES J. LENIHAN,
Counsel for Respondent.

APPENDIX "A"

73d Congress
2d Session

PUBLIC RESOLUTION NUMBER 53, 73D CONGRESS.
(48 Stat. 1267)

JOINT RESOLUTION

To amend the Settlement of War Claims Act of 1928, as amended.

WHEREAS the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

> "Sec. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said (Government) * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agent, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German * * *, American,

> or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *."

WHEREAS the Treaty between the United States and Germany of August 25, 1921, incorporated said provisions of such joint resolution and also provided in article I thereof as follows:

> "Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States"; and

WHEREAS by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

WHEREAS under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichsmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichsmarks per annum from April 1, 1930, to March 31, 1981; and

WHEREAS Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has, accordingly, failed to make suitable provision for the satisfaction of the said claims against Germany:

Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interests, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, any or all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the

same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this resolution: *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed: *And provided further,* That the action of the President in determining the period or periods in which Germany is in arrears in the payments hereinbefore described shall not be subject to judicial review.

APPENDIX "B"

Trading With The Enemy Act as Amended by the Settlement of War Claims Act (45 Stat. 254), entitled "An Act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian.", provides

> "9(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the times such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—
>
> * * *
>
> "9(b)(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m)* has been filed,
>
> * * *

---

*Note

Subsection (m) of Sec. 9 referred to in paragraph (13) above, is a provision of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, providing as follows, omitting the immaterial parts:

"Then the President, *without any application being made therefor,* may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian; * * *." (Italics ours.)

* * *

"9(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. * * *"

* * *

"9(a) That any person not an enemy or ally of enemy claiming any interest, right, or title in any

---

"(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) or subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25."

Section 25 provides for the investment out of the funds held by the Alien Property Custodian by the Treasurer of the United States in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of that section.

money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title * * * so claimed, and if so established *the court shall order the payment,* conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest * * *". (Italics ours.)

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 254

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT

THOMAS H. CREIGHTON, JR.,
OTTO C. SOMMERICH,
JAMES J. LENIHAN,
Attorneys.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States, *Petitioners,* v. DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.	No. 254

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR THE RESPONDENT

Opinions Below

The memorandum opinion of the Supreme Court of the District of Columbia (R. 5) is not reported. The opinion of the United States Circuit Court of Appeals for the District of Columbia (R. 8) and the subsequent opinion on motion for rehearing (R. 21) are reported in 83 F. (2d) 554, 562.

Jurisdiction

The opinion of the United States Court of Appeals for the District of Columbia (Groner, *J.*) was rendered February 17, 1936 (R. 8). On motion for rehearing a

per curiam opinion was rendered on May 4, 1936 (R. 21). The petition for writ of certiorari was filed August 3, 1936 and was granted October 12, 1936. The jurisdiction of this Court is invoked under the provision of Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

Statutes Involved

The Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411) as amended by the Settlement of War Claims Act of March 10, 1928 (c. 167, 45 Stat. 254), and by other acts (U.S.C., Title 50, Appendix); the pertinent provisions of which are set forth in Appendix A hereto, *infra,* pages i to vii.

Public Resolution No. 53, approved June 27, 1934 (c. 851, 48 Stat. 1267), which is set forth in full in Appendix B hereto, *infra,* pages viii to xi.

The Debt Funding Agreement of 1930, (executed on authority of the Act of June 5, 1930 (Pub. No. 307—71st Congress); the pertinent provisions of which are set forth in Appendix C hereto, *infra,* pages xii to xx.

The Knox-Porter Resolution, also known as Peace Resolution, approved July 2, 1921, (42 Stat. L. Part 2, 105), which is set forth in full in Appendix D hereto, *infra,* pages xxi to xxiv.

Agreement of August 10, 1922, between the United States and Germany for a Mixed Claims Commission (42 Stat. 2200), which is set forth in full in Appendix E hereto, *infra,* pages xxv to xxviii.

Treaty of Berlin (42 Stat. 1939), the pertinent sections of which are set forth in Appendix F hereto, *infra,* pages xxix to xxxv.

Statement

The action is brought under the express authorization of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928 (45 Stat. 254), which directed that there be returned to every German 80% of his or its property which had been seized under the Trading with the Enemy Act (40 Stat. 411), provided he filed a consent to the retention and use by the United States of the remaining 20% of said property.

Plaintiff is a corporation organized and existing under the laws of Germany (R. 1) and its property was seized by the Custodian pursuant to the terms of the Trading with the Enemy Act (R. 2).

Subsequent to the passage of the Settlement of War Claims Act of 1928, plaintiff filed its notice of claim with said Custodian together with the consent to the retention and use by the United States of 20% of its property (R. 2). The return of its property was delayed owing to a warrant of attachment filed in the Supreme Court of the District of Columbia, which was dismissed by a decree of that Court, dated May 24, 1934 (R. 2). Upon said dismissal plaintiff demanded the return to it of 80% of its property (R. 2), but actual payment thereof was withheld until after the enactment of Public Resolution No. 53, 73rd Congress, approved June 27, 1934 (48 Stat. 1267), when defendants set up said Public Resolution as an authorization for the withholding from plaintiff of its property although prior to the enactment of said Public Resolution 53 the Custodian had determined plaintiff was the owner of said property and entitled to the return thereof as provided for by the Trading with the Enemy Act as amended

by the Settlement of War Claims Act of 1928 (R. 3). Thereupon plaintiff instituted the present suit.

Defendants subsequently moved to dismiss the complaint (R. 4). This Motion to Dismiss was based upon Public Resolution No. 53, 73rd Congress, it being claimed that the return of the property of plaintiff, as prayed for in the Bill of Complaint, was, by virtue of said Resolution, prohibited (R. 45).

The text of the Resolution appears in the Appendix hereto, *infra,* pages viii to xi, but its general purport is to the effect that because the German Government is indebted to the United States under a debt-funding agreement between Germany and the United States, dated June 23, 1930, no further returns to individual Germans shall be made under the Settlement of War Claims Act until such time as the German Government shall have paid the amount it is in arrears under such debt-funding agreement of June 23, 1930, and

> "Provided further, That the President may in his sole discretion remove the restriction as to any of the cases or classes of cases * * *,"

and that his determination as to Germany being in arrears

> "shall not be subject to judicial review".

Prior to the enactment of Public Resolution 53, approximately 95% of the property taken by the Alien Property Custodian under the Trading with the Enemy Act, less the retained 20%, had been, under the provisions of the Settlement of War Claims Act of 1928, returned to its former owners of the same class as Deutsche Bank und Disconto-Gesellschaft (R. 12).

Questions Involved

1. Whether Public Resolution 53 operated as a withdrawal by Congress of the right of owners of property to sue for its recovery as provided for by Section 9, as amplified by Section 17, of the Trading with the Enemy Act as amended by the Settlement of War Claims Act of 1928.

2. Whether Public Resolution 53 attempts to deprive Germans who had then become alien friends of their vested right to property conferred upon them by the Settlement of War Claims Act of 1928.

3. Whether said Resolution attempts to confiscate property in time of peace, whereas such power of confiscation exists exclusively in time of war.

4. Whether, as its title and text discloses, the Settlement of War Claims Act of 1928 operated as a final settlement of claims by both Germans and Americans by which each party made certain concessions, by virtue of which rights were created, which cannot now be abrogated unilaterally by Congress.

5. Whether, upon filing its consent as the German owner to the retention of and use by the United States Government of 20% of its property, the plaintiff did not acquire under the Settlement of War Claims Act of 1928 a vested right which could not be affected by the subsequent passage of Public Resolution No. 53 postponing the return of said property until Germany shall comply with the debt-funding agreement of 1930 (Annual Report of Secretary of Treasury for year ended June 30, 1930, p. 341).

6. Whether Congress by vesting arbitrary discretion in the President wholly or partially to nullify Public Resolution No. 53 at his own will by returning property to some owners under the Act and refusing to return to others, unlawfully delegated its legislative power to the President.

7. Whether Public Resolution 53 involves undue discrimination between persons of the same class, by operating against the few Germans who, prior to the passage of said Resolution, filed consents to the retention of twenty per cent. of their property and who had not received their eighty per cent. without attempting to recall the eighty per cent. theretofore paid to the vast majority of Germans.

SUMMARY OF ARGUMENT

I. In view of the absence of any compelling language in Public Resolution No. 53 withdrawing from the former owners the privilege of suing the Attorney General, as successor to the Alien Property Custodian, for the return of their property as provided for by Section 9 of the Trading with the Enemy Act as amended, the consent of the United States to be sued has not been withdrawn.

II. The Settlement of War Claims Act, passed after adjustment by Congress of the claims of American nationals, German ship and patent owners and alien property owners based upon an agreement made between such claimants and owners, being a final disposition of the claims of all three groups, when the German owners filed the consent required by such Act to the temporary retention and use by the United States of 20% of their property, respondent acquired a vested right which cannot be affected by the subsequent passage of Public Resolution No. 53 with-

holding the return of said property until Germany shall comply with the terms of the Debt Funding Agreement of 1930 (Annual Report of Secretary of the Treasury for year ended June 30, 1930, p. 1341).

III. Congress having, by virtue of the Settlement of War Claims Act, refused to avail itself of the privilege, granted by the Treaty of Berlin, of confiscation of the property of former German owners, and having by virtue of the Debt Funding Agreement of 1930 agreed to accept the bonds of the German Government as sole security for the payment of amounts due the United States and its nationals under the Treaty of Peace, simultaneously disavowing the right further to hold the private property as security, respondent is not precluded by such Treaty from questioning the validity of Public Resolution No. 53.

IV. Congress, by vesting arbitrary discretion in the President wholly or partially to nullify Public Resolution No. 53 at his own will by directing the return of property to some owners and refusing it to others, unlawfully delegated its legislative power to the President.

V. Prior to the enactment of Public Resolution No. 53, out of $400,000,000 of property seized, 95% having already been returned under prior acts including the Settlement of War Claims Act, it is improper discrimination to withhold the return of the small balance, including the respondent's property.

ARGUMENT

Preliminary Statement

Succinctly stated, the contention of the respondent is that it has obtained a vested interest in the property here

involved which is protected by the Fifth Amendment to the Constitution and of which it cannot be deprived by Public Resolution 53.

In our view, the argument of petitioners, both as to the jurisdiction of the Courts and as to the alleged constitutionality of Public Resolution 53, ignores, in practical effect, the fundamental proposition that here is involved the question of a vested interest in property, protected by the Fifth Amendment, and immune to legislation which would effectively deprive it of such protection. It is our further view that petitioners' argument necessarily leads to the impossible conclusion that Congress has confiscated and can lawfully confiscate alien property in times of peace.

At the outset, therefore, we think it essential to set forth the history and policy of both the executive and legislative departments of the United States Government with relation to enemy property.

I.

The purpose and intent of both the executive and legislative departments in conformity with the unbroken policy of the United States was not to confiscate enemy property but to return it to the owners thereof.

(a) The purpose and intent of the executive department.

On February 8th, 1917, two months before the United States entered the war, the Secretary of State issued a statement, with Presidential sanction, at a time when Germans and Austrians were beginning to withdraw their

property for fear of its seizure in the event of war with their countries. This statement was as follows:

> "It having been reported to him that there is anxiety in some quarters on the part of persons residing in this country who are the subjects of foreign states lest their bank deposits or other property should be seized in the event of war between the United States and a foreign nation, *the President authorizes the statement that all such fears are entirely unfounded.* The Government of the United States will in no circumstances take advantage of a state of war to take possession of property to which international understandings and the recognized law of the land give it no just claim or title. *It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states.*" (Italics ours.)

When the Act known as the "Trading with the Enemy Act" was under consideration, Hon. Robert Lansing, Secretary of State; Hon. William C. Redfield, Secretary of Commerce; Hon. Charles Warren, Assistant Attorney General, and Dr. Edward E. Pratt, Chief of the Bureau of Foreign and Domestic Commerce of the Department of Commerce, under whose direction the act was drawn, appeared before the Committee on Interstate and Foreign Commerce, and on May 29, 1917, explained its object (Hearings before the House Committee on Interstate and Foreign Commerce, p. 13). Secretary Redfield, who spoke for Secretary Lansing in this matter, said in his presence:

> "The creation of an alien property custodian is a novelty and is in line with that same effort toward equity which impels us to indicate an earnest desire to show to the people with whom, unfortunately, we are engaged in war that here is the opposite of confiscation and here is the opposite of requisition."

The Government again on November 14, 1917, in the Official Bulletin of that date (No. 159), published the following announcement over the name of A. Mitchell Palmer, Alien Property Custodian: (Hearings before the Committee on Interstate and Foreign Commerce of House of Representatives, 67th Congress, 4th Session, of January 9, 1923, p. 209):

> "The purposes of Congress are to preserve enemy owned property in the United States from loss and to prevent every use of it which may be hostile and detrimental to the United States * * *. The Alien Property Custodian exercises the authority of a common-law trustee; there is no thought of a confiscation or dissipation of property thus held in trust."

In an address delivered at Philadelphia, November 23, 1923, then Secretary of State Hughes said (Hearings before the Committee on Ways and Means of House of Representatives, 69th Congress, 1st Session, of April 5, 1926, p. 380):

> "A confiscatory policy strikes not only at the interest of particular individuals but at the foundations of international intercourse, for it is only on the basis of the security of property, validly possessed under the laws existing at the time of its acquisition, that the conduct of activities in helpful cooperation, is possible. * * * Rights acquired under its laws by citizens of another state, [a state] is under an international obligation appropriately to recognize. It is the policy of the United States to support these fundamental principles."

In *Techt* v. *Hughes*, 229 N. Y. 222, Judge Cardozo stated at pages 244, 245:

> "The plaintiff is a resident; but even if she were a non-resident, and were within the hostile terri-

tory, the policy of the nation would not divest her of the title whether acquired before the war or later. Custody would then be assumed by the alien property custodian. The proceeds of the property, in the event of sale, would be kept within the jurisdiction. Title, however, would be unchanged, in default of the later exercise by Congress of the power of confiscation (40 Stat. ch. 106, pp. 416, 424), now seldom brought into play in the practice of enlightened nations (2 Westlake Int. L. 46, 47; *Brown* v. *U. S.*, 8 Cranch. 110)."

(b) The purpose and intent of Congress as established by the legislative history and actions of the United States relative to alien property.

1. THE TRADING WITH THE ENEMY ACT OF OCTOBER 6, 1917.

When the Trading with the Enemy Act was originally enacted the report of the Committee on Commerce, 65th Congress, 1st session, Report No. 113, contained the following statement:

> "* * * Under the old rule warring nations did not respect the property rights of their enemies, but a more enlightened opinion prevails at the present time, and it is now thought to be entirely proper to use the property of enemies without confiscating it; * * *.
>
> "While the theory on which the bill is drafted is that enemy property shall be protected and utilized, but not confiscated, the ultimate disposition of the enemy property received and held by the Government is left entirely to Congress, and provision is made that after the end of the war enemy claims

> to such property 'shall be settled as Congress shall direct'. "

And agreeable with the intent of Congress as expressed by the Committee, not one word will be found in the Trading with the Enemy Act of October 6, 1917, which even suggests confiscation. The property was to be seized and held by a custodian who was to hold, administer and account for the property until Congress should direct the settlement of any claim of any enemy to the property.

Section 12 of this Act provided as follows:

> "After the end of the war any claim of any enemy, or of an ally of enemy, to any money or other property received and held by the Alien Property Custodian, or deposited in the United States Treasury, shall be settled as Congress shall direct: * * *".

2. RETURNS AUTHORIZED PRIOR TO JULY 2, 1921.

As is well known, Congress very early after the cessation of hostilities began by legislation the direction of the return of property to former enemy owners. In 1919 Section 9 of the Act was amended to permit the return to those persons who were enemies solely by reason of residence in the territory of a nation associated with the United States in the prosecution of the war which was occupied by the military or naval forces of Germany or Austria-Hungary (41 Stat. L. 35). In 1920 the Act was further amended to permit the return to citizens of Czechoslovakia and other countries who were, at the time of the seizure, citizens of Austria-Hungary and therefore enemies; to American wives of Germans; to former dip-

lomatic officials of Germany and Austria-Hungary whose property was in this country by reason of the service of such officials; to the governments of Bulgaria or Turkey; to the governments of Germany or Austria, or Austria-Hungary where the money or other property was the diplomatic or consular property of such government (41 Stat. L. 977).

3. The Knox-Porter Peace Resolution of July 2, 1921.

By Public Resolution No. 8 of July 2, 1921 (c. 40, 42 Stat. 105) the war was declared at an end. Section 5 specifically provides, as to alien property, as follows:

> "All property * * * of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or their successor or successors, *shall have* * * * *made suitable provision* for the satisfaction of all claims against said Government(s), * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German,

> * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, * * *, until the Imperial German Government * * * or their successor or successors shall have * * * confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of * * * German nationals * * *, and shall have waived any and all pecuniary claims against the United States of America". (Italics ours.)

Speaking of this provision, Senator Knox, who had charge of the bill, stated (Cong. Record, Vol. 61, Part 4, Page 3249):

> "The purpose of the joint resolution is simply to hold in *status quo* the things that have been done by the Alien Property Custodian. The joint resolution simply states that until a *suitable adjustment has been made of the claims of American citizens against Germany* for the property that has been seized by Germany, the property in the hands of the Alien Property Custodian shall be held until Congress shall dispose of it.
>
> I do not know whether I have quite answered the question that has been propounded by the Senator from North Dakota, but what I have stated is the whole theory of the joint resolution, *not that we are in any way comitting ourselves to the proposition that we are going to retain alien enemy property, but that we are going to retain it only until suitable provision has been made for the satisfaction of American claims against Germany and against Austria".* (Italics ours.)

The very interesting debates in Congress, in which such able Senators, among others, as Senators Reed, Pomerene,

Borah, and Knox participated, will be found in Congressional Record, Vol. 61, Part I, pages 785-791; pages 850-852; and Part IV, page 3249.

4. The Treaty of Berlin of 1921.

The Treaty of Berlin (42 Stat. 1939) was executed on August 25, 1921 and proclaimed on November 14, 1921. Part and parcel of the Treaty is the above quoted Section 5 of said Peace Resolution of July 2, 1921.

5. The Agreement of August 10, 1922 for a Mixed Claims Commission.

By an agreement of August 10, 1922, Germany and the United States set up a Mixed Claims Commission to determine the amount of the claims of the United States and its nationals against Germany. The Agreement begins:

> "The United States of America and Germany, being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission * * *."

As is well known, the Mixed Claims Commission was organized and sat and adjudicated claims thereafter for several years.

6. Act of March 4, 1923, known as the Winslow Act.

On March 4, 1923, the President approved an act of Congress amending the Trading with the Enemy Act known as the Winslow Act (42 Stat. 1511).

This act directed the return of all the property held by the Alien Property Custodian to certain classes of claimants and up to $10,000 to each German owner, and further provided:

> "Sec. 23. The Alien Property Custodian is directed to pay to the person entitled thereto from and after the time this section takes effect, the net income, dividends, interest, annuity, or other earnings accruing and collected thereafter *on any property or money held in trust for such person* by the Alien Property Custodian, or the Treasurer of the United States for the account of the Alien Property Custodian, * * *; but no person shall be paid under this section any amount in excess of $10,000 per annum".
>
> Sec. 24. The Alien Property Custodian is authorized to pay all taxes * * * lawfully assessed by any body politic, against any money or other property held by him * * * under this act * * *. Such taxes and expenses shall be paid out of the money or other property against which such taxes are assessed * * * or, (if such money or other property is insufficient) out of any other money or property *held for the same person,* * * *." (Italics ours.)

7. The Settlement of War Claims Act of March 10, 1928.

By reason of the functioning of the Mixed Claims Commission since 1922, the amount of the claims of American

nationals against Germany was rather definitely known by 1928. Also by that time the amount which the United States was willing to pay on claims of German citizens against this Government on account of German Merchant ships, patents and radio stations seized during the war was definitely known.

Accordingly, Congress enacted the Settlement of War Claims Act of March 10, 1928 (45 Stat. 254) which, as its title indicates, provided "for the settlement of certain claims of American nationals against Germany * * * and nationals of Germany * * * against the United States, *and for the ultimate return of all property held by the Alien Property Custodian*".

It was not possible, however, to provide for the immediate payment of all claims in full. Accordingly, Congress provided for the immediate payment in full of all awards of the Mixed Claims Commission to American nationals of less than $100,000, for the payment of $100,000 to each of those to whom awards of more than $100,000 had been made, and for the payment of 80% of the balance remaining unpaid upon the awards in excess of $100,000.

It also provided for the immediate return to the German owners of 80% of their property held by the Alien Property Custodian on condition that they consent to the retention and use by the United States of the remaining 20%.

It provided for a Special Deposit Account in which was deposited 20% of German property in the hands of the Alien Property Custodian pursuant to the consent of the owners thereof, amounts which had been paid by Germany on account of awards of the Mixed Claims Commission and amounts which would thereafter be paid by Germany, interest which had been earned on Germany moneys in the hands of the Alien Property Custodian for the period from the

date of its seizure to March 4, 1923, and the amount appropriated by Congress for the payment of German claims for ships, patents and radio stations.

From this account there was to be paid in the order mentioned above the awards of the Mixed Claims Commission together with 50% of the amounts awarded to the German ship and patent owners.

Other payments after those enumerated above were provided for. (See Section 4, Settlement of War Claims Act of 1928.)

The Settlement of War Claims Act was enacted as a result of the fact that Congress had determined that Germany had made "suitable provision" for the satisfaction of American claims.

8. The Debt-Funding Agreement of 1930.

The Mixed Claims Commission had nothing to do with the ascertainment or awarding of the costs of the American army of occupation. And the Settlement of War Claims Act of 1928 made no provision for the payment of the costs of the American army of occupation.

On March 4, 1930, the President of the United States sent the following letter to Congress:

> "To the Congress of the United States:
>
> I am submitting herewith for your consideration a copy of the report of the Secretary of the Treasury regarding the proposed agreement and exchange of notes with Germany *for the complete and final* ***discharge of the obligations of that Government to*** *the United States* with respect to the awards made

by the Mixed Claims Commission, United States and Germany, and for the costs of this Government's army of occupation.

The plan of settlement has my approval, and I recommend that the Congress enact the necessary legislation authorizing it.

HERBERT HOOVER.

THE WHITE HOUSE, March 4, 1930." (Italics ours.)

Document 95, 71st Congress, 2d Session.

In the report of the Senate Committee on Finance, (Report No. 733, 71st Congress, 2nd Session) accompanying the bill, it quoted from a statement of Undersecretary of Treasury Mills, as follows:

> "The bill now before you for consideration authorizes the Secretary of the Treasury, with the approval of the President, to enter into an agreement with Germany, as set out in general terms in the bill, providing for the complete and final discharge of the obligations of Germany to the United States in respect of the awards of the Mixed Claims Commission, United States and Germany, and the costs of the United States Army of Occupation."

The Act of June 5, 1930 (Pub. No. 307—71st Congress) authorized the execution of such a Debt-Funding Agreement between the United States and Germany. Pursuant to said authority, such Agreement was entered into on June 23, 1930 (Annual Report of Secretary of Treasury for year ending June 30, 1930, pp. 341-347).

In the Preamble thereof, it is recited that Germany is obligated to pay the awards of the Mixed Claims Com-

mission; that it is also obligated to pay the costs of the American army of occupation; that Germany has made payments on the account of such obligations; and that the parties "desire to make arrangements for the complete and final discharge of said obligations".

By Par. 1, Germany agreed to pay 40,800,000 reichsmarks per year until March 31, 1981 in payment of the awards of the Mixed Claims Commission and other millions of reichsmarks per year as set forth in the Agreement until September 30, 1965 in payment of the costs of the American army of occupation. In the case of both classes of payments, it was agreed that the United States would accept the bonds of Germany as sole security for the debt.

By Par. 4, it was agreed that:

> "The United States hereby agrees to accept the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations hereunder".

In notes which were exchanged between the two governments coincident with the execution of the Agreement, it is provided:

> "(a) In respect of the acceptance by the United States of the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations under the agreement, Germany will be in the same position as the principal debtors of the United States under the debt funding agreements which exist between them and the United States.
>
> (b) Nothing contained therein shall be construed as requiring the United States to release any

German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States."

This was designed conclusively to discharge the private property as a pledge for Germany's public debt to the United States, and to keep the two questions permanently separate and distinct.

9. Returns under the Settlement of War Claims Act.

After the enactment of the Settlement of War Claims Act of 1928, and prior to the enactment of Public Resolution 53 on June 27, 1934, all of the German property amounting to hundreds of millions of dollars and representing 80% of the German property held by the Alien Property Custodian was returned to the owners, except only a few millions of dollars amounting to about 5% of the property returnable under the Act (R. 12).

10. Summary.

By way of summary, we emphasize that the legislation, including the treaties and agreements, shows conclusively:

(a) That it was the avowed intent and purpose of Congress not to confiscate the property.

(b) That the Trading with the Enemy Act of October 6, 1917, did not purport to effect a confiscation of the property.

(c) That the entire purpose, intent, and expression of the Act was merely to hold the property until the further direction of Congress.

(d) That the purpose of Congress to hold the property as security for claims against Germany was clearly limited in the Peace Resolution of July 2, 1921 to such time as Germany made suitable provision for the payment of the claims.

(e) That such purpose was incorporated in and made a part of the Treaty of Berlin of August 25, 1921.

(f) That, aside from reparations payments being made to the United States by Germany, the first step in such suitable provision was the Mixed Claims Agreement of 1922.

(g) That in recognition of the satisfactory progress of suitable arrangements by Germany, Congress, by the Winslow Act of 1923, released to each owner having less than $10,000 all of his property, released $10,000 to each of the other owners, and released income annually thereafter up to $10,000.

(h) That, in 1928, when the amounts of the claims were ascertained, and when there was about $138,000,000 available for payment of claims, Congress, by the Settlement of War Claims Act of March 10, 1928, determined definitely and conclusively that suitable arrangements had been made and, therefore, provided for the immediate release of 80% of the property.

(i) That by the Debt-Funding Agreement of 1930 Congress, in further recognition of the fact that by the Settlement of War Claims Act of 1928 it had given up its

control over 80% of the property and relinquished its right to hold it as security for awards made by the Mixed Claims Commission agreed to and did accept the full faith and credit of Germany as the only security and guaranty for Germany's obligations and agreed to and did accept the bonds of Germany in evidence of such obligation.

(j) That all control of 80% of the property, theretofore enjoyed by Congress, was, by the Settlement of War Claims Act of 1928, effectively and irrevocably surrendered and such surrender was, by the Debt-Funding Agreement of 1930, emphasized and reiterated.

II.

The Courts have jurisdiction of this action.

(a) The remedy of respondent.

The remedy afforded to respondent is found in the express provisions of the Trading with the Enemy Act (Appendix 50, U.S.C.A., 189). By subsection 13 of Section 9(b) thereof (Appendix 50, U.S.C.A., 245), respondent and those in its class became entitled to the return of their property under the condition, as provided in Section 9(m) (Appendix 50, U.S.C.A., 247-248), that they "file a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property". By Section 9(c) (Appendix 50, U.S.C.A., 246) it is provided that respondent may file a notice of claim for the return of the property as provided in section 9(a) (Appendix 50, U.S.C.A., 241) and "may institute suit in equity to recover such money or other property, as provided in said subsection and with like effect."

By Section 9(a) (Appendix 50, U.S.C.A., 241), it is provided that a claimant shall file a notice of claim with the Alien Property Custodian and may make application to the President for the return and that the President may order the return. It then provides:

> "If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required and shall have made no application to the President, said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * (to which suit the Alien Property Custodian or the Treasurer of the United States, as the case may be, shall be made a party defendant), to establish the interest, right, title, or debt so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled."

This suit has been so instituted in "the Supreme Court of the District of Columbia". It is alleged that the Alien Property Custodian seized the property of respondent as described in the Bill of Complaint (R. 2); that the respondent filed its notice of claim with the Alien Property Custodian (R. 2); that the Alien Property Custodian determined that respondent was entitled to the return of the property (R. 2); that, though demand has been made therefor, he has failed and refused to order the return thereof (R. 2-3); that the assigned reason for such failure and refusal to order the return was Public Resolution 53 (R. 3); and that Public Resolution 53 is unconstitutional (R. 4).

Thus, it will be seen that jurisdiction is specifically conferred upon the courts by the provisions of the Trading with the Enemy Act and that this suit is brought and clearly maintainable under the provisions of that Act.

(b) Public Resolution 53 does not withdraw the consent of the United States to be sued.

Public Resolution No. 53 does not contain any language forbidding the maintenance of actions. It simply forbids the return of any further property while Germany is in default.

If the Act is a nullity, and the provisions of the Settlement of War Claims Act are operative, since that Act expressly permits the bringing of an action to recover property, and since Public Resolution No. 53 does not forbid the bringing of any action, but merely directs that no further property shall be returned, it cannot properly be claimed by the petitioners that Congress has expressly forbidden the maintenance of this present action.

In the very recent case of *Becker Steel Company of America* v. *Cummings, et al.,* 296 U. S. 74, this Court said (p. 80):

> "Only compelling language in the congressional enactment will be construed as withdrawing or curtailing the privilege of suit against the government granted in recognition of an obligation imposed by the Constitution. See *Lynch* v. *United States,* 292 U. S. 571, 586, 587; *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481, 489. *Hence Section 9 (a) must be broadly construed to give effect to its remedial purpose,* see *Miller* v. *Robertson,* 266 U. S. 243, 248; *Behn Meyer & Co.* v. *Miller,* 266 U. S. 457, 471, 472." (Italics ours.)

If Congress had intended to deprive German owners of the right to sue, Congress would have used express language to that effect. Such express language was used in the Independent Offices Appropriation Act for 1935, which expressly provides, with respect to the 2% deduction for expenses as follows (48 Stat. 509, 510):

> "* * * nor shall any suit be instituted or maintained against the Alien Property Custodian * * *".

In the case of *Lynch* v. *United States*, 292 U. S. 571, this Court held that unless the right to sue was expressly taken by Congress from a war risk insurance claimant such claimant could not be deprived of his rights under a war risk policy by an unconstitutional repudiation of a contract by a statute providing for nonpayment of the policy. Its language on this subject is as follows (p. 583):

> "The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States. As Congress took away the contractual right, it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of section 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by section 405 of the Act of 1917 (40 Stat. 410), which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obvi-

ously Congress did not intend to repeal generally the section providing for suits."

(c) The property has not been covered into the Treasury.

Notwithstanding the clear provisions of the Trading with the Enemy Act as amended, and notwithstanding that there is no language in Public Resolution 53 withdrawing the consent of the United States to be sued, petitioners argue (nevertheless) that the courts are without jurisdiction and they do so upon hypotheses which, we submit, ignore the fundamental issue that Public Resolution 53 is unconstitutional.

They first say that the Resolution prohibits payments of either money or property "whether or not a judgment or decree has been entered with respect thereto"; that Article I, Section 9, Clause 7 of the Constitution provides that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law"; and that "this Court has frequently decided that no judgment or decree of any court can compel the payment of money from the Treasury unless there has been an authorization by Congress".

There is, of course, no question that the Courts cannot compel the payments of money out of the Treasury in violation of the Constitution. But petitioners ignore the fact that this money has never been covered into the Treasury.

It is true that Section 12 of the Act (Appendix 50, U. S. C. A. 278) provides that monies seized by the Alien Property Custodian "shall be deposited forthwith in the Treasury of the United States". But it is also true and obvi-

ous that they are not deposited in the Treasury as revenues or monies of the United States. They are monies held in trust, marked and identified as trusts, in the names of the owners, held as such pending a determination by Congress as to their disposition, and have been constantly and in the millions paid out as Congress has directed and without appropriations. In Section 9 (a) it is provided that when suit is instituted thereunder, the money shall be retained "in the Treasury of the United States as provided in this Act" until final judgment is satisfied by payment "on order of the Court". Obviously, there was no intent or purpose that the monies should be covered into the Treasury to be drawn therefrom by congressional appropriations and such has not been the practice from the inception of the Act until this day.

The Abandoned and Captured Property Act of July 2, 1864 (13 Stat. 375) provided that monies realized from abandoned and captured property should "be paid into the Treasury of the United States". Construing that provision, this Court held in the case of *United States* v. *Johnston,* 124 U. S. 236, 252, that such money was not "technically, in departmental language, 'covered into the Treasury,' " and that it was not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution. And this Court, in support of its construction, cited the fact that millions had been paid out without any appropriation therefor (p. 253).

Section 12 of the Trading with the Enemy Act provides that (50 U. S. C. A. Appendix, p. 278):

> "All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the

> Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; * * *"

Under this section of the Trading with the Enemy Act, President Wilson issued an Executive order dated February 26, 1918, reading in part as follows (Meares, Trading with the Enemy Act, p. 592):

> "Any and all moneys so deposited in the Treasury of the United States, as herein provided, as well as all moneys, if any, which may be paid to the Treasurer of the United States, as provided in Section 12 of said Act, and all interest, dividends or other income, if any, in respect of any property conveyed, transferred, assigned or delivered to the Treasurer of the United States, as provided in said Section 12, shall be credited by the Treasurer of the United States to the Secretary of the Treasury 'for account of the Alien Property Custodian.'
>
> "Any and all money so deposited in the Treasury of the United States, as herein provided, together with any interest or income received from the investment thereof, shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payment or payments pursuant to the provisions of said Act, and, until so withdrawn, may be invested and reinvested, from time to time, by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness."

In January 1926, the Alien Property Custodian inquired of Attorney General Sargent as to whether he had the power to return money which had been deposited in the Treasury and whether the Secretary of the Treasury should

draw checks as requested by him. On March 4, 1926, the Attorney General, in an opinion which is not published, replied:

> "In regard to the second question presented, the Act provides that the moneys received by the Custodian in pursuance thereof shall be deposited forthwith in the Treasury of the United States under such rules and regulations as the President shall prescribe. The Executive Order of February 26, 1918, provided that said moneys shall be deposited in the Treasury of the United States through the office of the Secretary of the Treasury; and that all such moneys so deposited shall be subject to withdrawal by the Secretary of the Treasury for the purpose of making any payments pursuant to the provisions of said Act and until so withdrawn shall be held by the Secretary of the Treasury for account of the Alien Property Custodian. In view of your statement that these moneys were deposited in the Treasury in accordance with Section 12 of said Act, it is assumed that they have not been covered into the Treasury by warrant within the meaning of Section 305 R. S. such as to constitute them public moneys. If such were the case they could not be withdrawn except by the express authority of Congress. Constitution, Art. 1.
>
> "In *Rice, assignee* v. *United States,* 21 C. Cls. 413, it was said by Richardson, *C. J.,* who was entirely familiar with the mode of conducting business in the Treasury Department, that 'while Mr. Chase was Secretary of the Treasury and for sometime afterwards the money received from captured and abandoned property was merely *deposited with the Treasurer* and was not technically, in Departmental language, 'covered into the Treasury'; and so, according to the construction then given by the De-

> partment was not subject to the Constitutional provisions that 'no money shall be drawn from the Treasury but in consequence of appropriation made by law'. This case was cited and followed by the Supreme Court of the United States in *United States* v. *Johnston,* 124 U. S. 236."

In the annual reports of the Secretary of the Treasury, the moneys deposited by the Alien Property Custodian are reported with the following caption:

"Alien property trust fund"

(See Annual Report of the Secretary of the Treasury on the State of Finances for the Fiscal Year Ended June 30, 1935, page 79).

We think it too clear for extended argument that, from the entire purpose and intent of the Act, from the provisions thereof, from the long continued practice thereunder in which hundreds of millions have been paid out without appropriations, and from the decisions of this and other Courts, the monies here involved were not intended to be and have not been covered into the Treasury and are not subject to the provisions of Art. I, Sec. 9, Cl. 7 of the Constitution.

With reference to the stocks and bonds here involved, petitioners argue that the Congress has power over them under Art. IV, Sec. 3, Cl. 2 of the Constitution as property of the United States. But, it is at once apparent that Congress did not intend to confiscate and has not confiscated the property. Like the money, it is held in trust, identified as trust property, and Congress has directed its return. It is not property of the United States subject to the provisions of Art. IV, Sec. 3, Cl. 2 anymore than is the money subject to the provisions of Art. I, Sec. 9, Cl. 7.

(d) The prohibition of Public Resolution 53 against payments "whether or not a judgment or decree has been entered" does not destroy the jurisdiction of the Courts.

In their attack upon the jurisdiction of the Courts, petitioners next contend (Brief, page 15) that "Congress, by the Resolution prohibiting payment of any judgment, has effectively destroyed the jurisdiction of any court exercising true judicial power".

This Court, in the case of *Nashville, Chattanooga & St. Louis Railway* v. *Roy C. Wallace,* 288 U. S. 249, holding actions for declaratory judgments to be controversies within the meaning of the Constitution, demonstrated quite clearly that a provision for payment of a judgment is not an essential feature of a judgment. Referring to the case of *U. S.* v. *Jones,* 119 U. S. 477, to the effect that this Court can entertain an appeal from a judgment of the Court of Claims, even though such judgment is not enforceable without a specific appropriation of Congress, this Court stated (page 263) that it has often exerted its judicial power:

> "* * * to review judgments of the Court of Claims although no process issues against the Government * * *".

The cases referred to by the Government in no way apply.

Hayburn's Case, 2 Dall. 409, was an attempted appeal from a decision of a Circuit Judge appointed under an act of Congress requiring the Circuit Courts of the United States to examine into various claims. The opinions of the judges were not final but reviewable by an executive office. Therefore, this Court held that their duties were not judicial.

Similarly, in *U. S.* v. *Ferreira,* 13 How. 40, 46, a district judge of Florida was authorized to adjudicate claims against the United States. His decision was subject to review by the Secretary of War and this Court again declared the power conferred upon such a judge as not judicial within the meaning of the Constitution.

And so likewise, in the case of *Gordon* v. *U. S.,* 117 U. S. 697, where Judge Taney held that this Court did not have jurisdiction to review a judgment of the Court of Claims, when such judgment was subject to review by the Secretary of the Treasury. Afterwards, when such right of review was taken away from the Treasury Department by Congress, the judgment of the Court of Claims was held reviewable by this Court. *U. S.* v. *Jones,* 119 U. S. 477.

The decision in the case of *District of Columbia* v. *Eslin,* 183 U. S. 62, likewise, is inapplicable. In that case the plaintiffs, contractors with the District of Columbia, were awarded under an act of Congress of February 13, 1895 (28 Stat. 664) certain rates of compensation established by the board of public works. These were gratuities awarded by Congress. Subsequently, Congress passed the act of March 3d, 1897, chap. 387, providing that the act of February 13, 1895, allowing the aforesaid rates,

> "be, and the same is hereby repealed, and *all proceedings pending shall be vacated,* and no judgment heretofore rendered in pursuance of said act shall be paid." 29 Stat. 665, 669. (Italics ours.)

The same Statute was construed in *In re Hall,* 167 U. S. 38, where the court said (pp. 42-43):

> "This court had just decided that the act of February 13, 1895, 28 Stat. 644, simply conferred a gratuity upon the persons covered by its provisions; that there was no element of a legal or an equitable claim in their favor against the municipal authorities of the District, but that the act provided for a gift which was wholly without consideration. The repeal of the act took away all jurisdiction in the Court of Claims to proceed further, so far as concerned any rights founded upon the act so repealed."

The Court will note the language of the statute in the *Eslin* case which provided that

> "all proceedings pending shall be vacated".

In the present statute, no such language appears vacating all pending proceedings.

As we stated in a previous part of this Brief, had Congress intended to take away all remedy whatsoever, it could easily have used such express language. Furthermore, the language forbidding payment cannot deprive the former owners of their constitutional right.

In the case of *Lynch* v. *U. S.*, 292 U. S. 571, Section 17 of the Economy Act of March 20, 1933 (48 Stat. 11) (38 U.S.C.A., §§ 717, 718), commonly known as the Economy Act, is referred to, and provides (p. 584):

> "* * * all laws granting or pertaining to yearly renewal term insurance are hereby repealed, but payments in accordance with such laws shall continue to the last day of the third calendar month following the month during which this chapter is enacted."

Implicit in this language, coupled with the declared purpose of the "Economy Act", is the intent to discontinue payments after the last day of the third calendar month. The aim of the Act was to relieve the Government of the obligation to make further payments on the repealed insurance. Nevertheless, this Court held that the Act attempted an unconstitutional revocation of the rights of beneficiaries and did not constitute a withdrawal of the right to sue.

Consequently, in the absence of express language taking away the privilege of suit, if the rights of the plaintiffs are vested, the forbidding of payment does not deprive the plaintiffs of their rights as friendly aliens to invoke the jurisdiction of this Court and of the court below.

(e) Public Resolution 53 may not be construed as a withdrawal of the right to sue the United States.

Next the petitioners contend that Public Resolution 53 was intended by Congress as a withdrawal of the consent of the United States to be sued.

We have hereinbefore pointed out that the jurisdiction conferred on the courts by the Act was in no way limited or destroyed by Public Resolution 53 and that there is no language in the Resolution expressive of such limitation or destruction.

Congress could not intend, as the necessary deductions from petitioners' argument would imply, to deprive claimants of their constitutional rights by the passage of an unconstitutional Resolution. The argument leads to the impossible assumption that Congress, and Congress alone, should be the judge of the constitutionality of its Acts.

As was said by this Court in *Lynch* v. *United States*, 292 U. S. 571, 587:

> "But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized *that these had contractual rights.*" (Italics ours.)

So also in this case "it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from" those having vested rights in the property "if it had realized that these had contractual rights".

Furthermore there is not a word in the Resolution to show that Congress withdrew, or intended to withdraw, the right to sue. As the Court below stated (R. 13):

> "But, as we have pointed out, Section 11 of the Settlement of War Claims Act of 1928, authorizing former enemy owners to proceed under subsection (a) of Sec. 9 of the Trading with the Enemy Act, specifically gives a right of action to such enemy owners to proceed in the Supreme Court of the District of Columbia to establish their claims and to have a final decree for restoration. And while, as we think, Congress retained the power to withdraw the consent at any time—*Lynch* v. *United States*, 292 U. S. 571, 581—until withdrawn the privilege to sue cannot be challenged. And, in the view we take of the language used by Congress in the Resolution, nothing there can be said to constitute a withdrawal of consent. Certainly there is no apt language used to that effect. And we take it to be true that the same formality necessary to create the right is equally necessary to its withdrawal. The Resolution is not confiscatory of the property here in suit.

It is not, as we think, a withdrawal of consent to be sued."

(f) The consent to sue, Section 9 of the Trading with the Enemy Act, expressly grants the privilege of suit in order to obtain payment.

The Trading with the Enemy Act, by Section 9 as amended, authorizes claimants to

> "* * * institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title, or debt so claimed, *and if so established the court shall* order the payment * * *." (Italics ours.)

According to petitioners, Section 9 has for its sole object the obtaining of a declaratory judgment. The Government in its brief, contends that the apparent object of the Trading with the Enemy Act, referring to this section, was (pp. 23-24):

> "to allow a suit to be instituted only where it was necessary for the claimant to establish its right, title and interest; that is, judicial determination was provided when a question of ownership was in issue."

Section 9 was inserted in the original Trading with the Enemy Act largely for the purpose of giving to a non-enemy owner or a person whose property was wrongfully seized the privilege of going into court and obtaining the return of his property thus wrongfully seized. It was this section of the Act which prevented the Trading with the Enemy Act from being unconstitutional.

It was with reference to this section of the Trading with the Enemy Act that this Court in the case of *Stochr* v. *Wal-*

lace, 255 U. S. 239, held that during the War the Executive had the privilege of first determining what was enemy property and then seizing it, and in case of wrongful seizure, the owner was accorded the privilege of bringing a proceeding under Section 9 of the Trading with the Enemy Act to obtain the property thus wrongfully seized. Referring to this Section of the Trading with the Enemy Act this Court said as follows (pp. 245-246):

> "That Congress in time of war may authorize and provide for the seizure and sequestration through executive channels of property believed to be enemy-owned, if adequate provision be made for a return in case of mistake, is not debatable. *Central Union Trust Co.* v. *Garvan, supra.* There is no warrant for saying that the enemy ownership must be determined judicially before the property can be seized; and the practice has been the other way. The present act commits the determination of that question to the President, or the representative through whom he acts, but it does not make his action final. On the contrary, it distinctly reserves to any claimant who is neither an enemy nor an ally of an enemy a right to assert and establish his claim by a suit in equity unembarrassed by the precedent executive determination. Not only so, but pending the suit, which the claimant may bring as promptly after the seizure as he chooses, the property is to be retained by the Custodian to abide the result and, if the claimant prevails, is to be forthwith returned to him. Thus there is provision for the return of property mistakenly sequestered; and we have no hesitation in pronouncing it adequate, for it enables the claimant as of right, to obtain a full hearing on his claim in a court having power to enforce it if found meritorious."

To contend that Section 9 of the Trading with the Enemy Act has for its sole object a declaratory judgment, and does not give the courts mentioned in the Act the power to enforce these provisions, is contradicted by Section 17 of the Act which reads as follows:

> "The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises *to enforce the provisions of this Act*, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary' (sections 225 and 345 of Title 28 Judicial Code and Judiciary)."

The petitioners says that the plaintiff is asking for a mandamus. Plaintiff is not asking for a mandamus. It is asking for a return of its own property (so determined by the petitioners), in accordance with the language of subsection (a) of Section 9, which provides that the court shall

> "order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *."

III.

Public Resolution 53 is unconstitutional in that it deprives respondent of a vested right in property, acquired under the Settlement of War Claims Act of 1928, contrary to the Fifth Amendment to the Constitution of the United States.

(a) Events leading up to the Settlement of War Claims Act of March 10, 1928.

It is here to be emphasized, as we pointed out hereinbefore, that Section 5 of the Knox-Porter Peace Resolution of July 2, 1921 (quoted *ante*, pp. 13-14) provided for the holding of the property until Germany "shall have * * * made suitable provision for the satisfaction of all claims" and that such provision was incorporated in and made a part of the Treaty of Berlin of August 25, 1921.

We have also pointed out that subsequent to the Treaty and on August 10, 1922, an agreement was made between the United States and Germany whereby a Mixed Claims Commission was set up for the ascertainment of all claims of American Nationals against Germany.

Then, we have pointed out that as it became apparent that Germany was making provision for the satisfaction of claims, Congress began actively to return property which had theretofore been enemy property under the Act. Notably, by the Winslow Act of 1923, Congress very definitely evinced a relaxation of its right to hold and control the property as security for the payment of American claims by providing for substantial returns to Germans.

Finally, we have pointed out that, by 1928, the amount of the claims of American citizens was rather definitely determined by the Mixed Claims Commission. What, then, was the purpose of the Settlement of War Claims Act? Granting that, in 1928, we still had the privilege to hold the property as security for the payment of claims, what, in fact, was the purpose of the Settlement Act and what was the legal result thereof? In fine, the question resolves itself into one of not what the United States might have done under Sec. 2 of the Treaty of Berlin but rather what did it do notwithstanding reserved powers under Sec. 2 of that Treaty.

After all, the whole burden of the legislation is predicated upon the power of Congress to hold the property and to direct its return. Congress announced, on July 2, 1921, that it proposed to hold the property until Germany should make suitable provision for the payment of American claims. The Settlement Act itself is devoid of any expression of any intention to further hold eighty per cent of the property and is conclusive in its direction to return eighty per cent. It is more that appropriate, therefore, that we inquire into the circumstances which begot the Act and the intent of Congress in enacting it.

In the first place we find that the Settlement of War Claims Act was the result of an agreement between the German owners, the American claimants and the United States by which the American claimants and German owners each gave up temporarily a part of their rights.

The Treasury had, since 1925, insisted that the institution of private property and the protection of American private property abroad, not to speak of the definite commitments of the United States, made it essential that the

sequestrated private property be returned in full to its owners. (See Document No. 191, 69th Congress, 2nd Session.)

An Administration bill to this effect was introduced in 1926. The American claimants against Germany, however, felt that if the property were returned in full there would be insufficient funds with which to pay any considerable percentage of their claims. They therefore opposed immediate return in full, and advocated a compromise. The American claimants agreed among themselves that the owners of claims under $100,000 should be paid in full, whereas the balance of the large claimants would accept $100,000 plus a sum sufficient to make up 80% of their awards. For the balance, drawing interest at 5%, the American claimants were willing to wait.

Mr. Sidley, speaking for the American claimants, testified before the Senate Committee. See Hearings before the Committee on Finance, Jan. 23, 1928, United States Senate, 70th Congress, 1st Session (H. R. 7201) as follows (p. 22):

> "I am here to explain why it is that we would not want to go in and ask for a larger award for the German property. There has been a suggestion of 40 per cent instead of 20 per cent. Some people have asked why we do not come in and insist that there be 40 instead of 20, because obviously we would be benefited by it. Our answer to that is that under the insistence of the committee of the House and in view generally of the situation which existed, it became necessary for us to enter into an understanding with the German interests in order to get some kind of a bill through. The vital thing to us is to get a bill. The most unhappy thing would be a deferment of the bill beyond this session. It was

said to us by the Committee on Ways and Means that, 'You and these Germans try to get together on some compromise and see if you can not get a basis upon which we can act,' and it was suggested by Mr. Green at the time that, 'Possibly if you could get 75 per cent of your claims now and the Germans 75 per cent of the property, and defer the balance, that might be a basis.'

"Consequently, we had a meeting of our committee and conferred with our people as far as we could and concluded that we could make some substantial concessions in order to get some kind of a bill through. We met the Germans, Doctor Kiesselbach and Doctor von Lewinsky, and they assured us they did represent substantially all of the interests which had to do with the alien property fund and that they also spoke for the shipowners, and they were prepared to make very substantial concessions; not what we would like—the bill is not what we wanted to begin with—but they offered this 20 per cent retention of the alien-property fund. They offered to throw in all of the unallocated interest. They offered this 50 per cent of the ship money, which looked like a considerable concession, and we concluded upon that basis we would report to Mr. Green that we would support the bill on that basis."

This agreement is to be found in the Hearings before the Committee on Finance, Jan. 8, 1927, 69th Congress, 2nd Session (p. 129) and reads as follows:

"December 1, 1926.

"Hon. William R. Green,
Chairman Ways and Means Committee,
House of Representatives.

Dear Mr. Green: For your information and that of your committee in drafting proposed legislation, we note the following as a general basis of agree-

ment between the American and German interests which we respectfully represent:

1. Twenty per cent of the alien property fund to be temporarily retained and so invested in Dawes plan annuities as to become applicable to the immediate payment of American claims, the balance of the 80 per cent of the alien property fund to be promptly returned to the owners.

2. Fifty per cent of awards for payment of German ships, radio stations, patents, etc., to be likewise temporarily retained and applied to American claims as soon as it becomes available, and the balance of such awards distributed to ship owners, et al.

3. The $26,000,000, approximately, of unallocated interest in the hands of the Treasury to be similarly applied to American claims.

4. The $14,000,000, approximately, of Dawes plan payments received up to September, 1927, to be applied to the payment of American claims.

5. All funds in the hands of the Alien Property Custodian formerly belonging to the German Government, together with all funds so held the ownership of which is not disclosed within a period to be fixed in the bill, and thereafter established to be applied to the payment of American claims.

6. To the extent that the above payments on the American claims fall short of 80 per cent of the total amount of such claims, including interest thereon as awarded to January 1, 1927, the receipts from the Dawes plan payments accruing subsequent to September, 1927, to be first applied to payment thereof until such 80 per cent has been paid in full, and thereafter said receipts from the Dawes plan

payments to be distributed ratably among the remaining unpaid claims of Americans, alien property claimants, and ship, radio, and patent claimants, together with 3½ per cent interest thereon, until they are paid in full; and thereafter these Dawes plan payments to be applied as they accrue to the payment of the $26,000,000 of unallocated interest advances as aforesaid, together with 3½ per cent interest thereon until paid, thereafter the Dawes plan payments to be applied to the payment of the United States Government awards against Germany.

WILLIAM P. SIDLEY,
For the American Claimants.

W. KIESSELBACH,
For the German Claimants."

The Committee on Finance of the Senate reported (S. Rep. 273—70th Congress—1st Session, p. 4) this agreement as follows:

"Under the terms of the bill an amount equal to 80 per cent of the aggregate of the awards entered by the Mixed Claims Commission, entered on account of claims of nationals of the United States, is to be used immediately for the payment of all death and personal injury claims awards and all awards of $100,000 or less. The balance is to be prorated among the larger awards. The above percentage was reached by an agreement between the representatives of the American claimants affected and of the German alien property owners. The representatives of the American claimants appeared before your Committee and testified that the percentage was very satisfactory and that they preferred that the provisions of the bill be in accordance with the agreement. Consequently, your Committee is recommending no change."

Thus, does it appear that all parties concerned were agreeable to the plan and that the proposed provisions were suitable provisions for the payment of the American claimants.

The Report of the Committee on Finance of the Senate (S. Rep. 273—70th Congress—1st Session) is unusually complete and detailed.

The report states that the Mixed Claims Commission had been set up and awards had been made and that Germany had undertaken to pay the awards. It then states at p. 2:

> "But if the American claimants are forced to rely upon the distributive share in the payments by Germany, approximately 61 years will be required for payment in full. *Consequently, some method must be provided by which the American claimants can obtain a more immediate payment.*"

A "method" which would have provided for "a more immediate payment" would have been the sale and disposition of the alien property. However, Congress proposed no such "method".

The report then states at p. 2 that:

> "Under the Knox-Porter peace resolution, which was incorporated in the Treaty of Berlin, the United States unquestionably possesses the right to retain this property until Germany has made suitable provision for the satisfaction of the claims of American nationals against the German Government."

but the report states at p. 2:

> "Unless, however, Congress is prepared to adopt a policy of confiscating the property of an enemy national to pay the debts of his government some provision must be made for a more immediate return of this property."

Taking up the provisions of the Bill for the immediate return of eighty per cent of the property, the Committee reported that the whole policy of Congress had been not to confiscate and to ultimately return the property to the owners thereof. They reported (Report 273, 70th Congress, 1st Session, p. 12):

> "The text of the trading with the enemy act as originally enacted, the reports of the committees accompanying the bill, the discussion on the floor of both Houses of Congress, and numerous court decisions under the original act, clearly indicate that the act contemplated sequestration rather than confiscation. The amendment of March 28, 1918, however, broadened the powers of the Alien Property Custodian so as to include the right to manage or sell the property 'as though he were the absolute owner,' and in the so-called Chemical Foundation case decided by the Supreme Court on October 11, 1926, the Supreme Court held that when any of the property was sold the former enemy owners were deprived of all rights in the property and in the proceeds derived from the sale. Though it was unnecessary for the purposes of this particular decision, the language of the court is broad enough to be open to the construction that the seizure of property under the authority of the trading with the enemy act, as amended, together with the applicable treaty provisions, deprived the owner of all rights, whether or not the property was sold, and that the property was virtually confiscated.
>
> "It is to be noted, however, that even if the property should be held to have been confiscated (under the dictum of this decision), in spite of the clear intent of Congress to the contrary, Congress nevertheless has retained at all times absolute authority over this property and could at any time not only return it to the orginal owner but declare

it to be held for the benefit of and for ultimate return to the original owner. This is apparently just what Congress did under the terms of the Winslow Act in providing that $10,000 of the principal shall be returned to each individual owner, and that thereafter the earnings or interest on the property remaining in the hands of the Alien Property Custodian shall be paid to the owner annually up to the sum of $10,000. So that notwithstanding the undoubted power of Congress to confiscate, reaffirmed in the Chemical Foundation case, Congress not only has refused to exercise that power up to the present time but has clearly by legislation asserted its policy to be the very contrary of confiscation.

"It is fair to say that the primary reason for not returning all the alien property at the time of the adoption of the Winslow Act was that Congress was under a duty to retain sufficient property as security until the German Government should make adequate provision for the settlement of the claims of American nationals against Germany and its nationals."

Then the Committee took up the provisions of the Treaty of Berlin as follows:

"The treaty provisions governing the disposition of the alien property are to be found in Section IV of Part X of the treaty of Versailles (article 297 et seq.), the rights under which are specifically reserved to the United States under the preamble and Article II of the treaty of Berlin. Under these provisions, the allied and associated powers reserved the right to liquidate the property of German nationals that had come into their hands, and to apply the proceeds to the settlement of claims of their own nationals against Germany based upon the economic clauses (Part X) of the treaty, and

to retain any property or the proceeds thereof not so used, and provided that any property or the proceeds thereof not used for the settlement of the claims of their own nationals should be credited to Germany on her reparation obligations. Germany at the same time undertook 'to compensate her nationals in respect to the sale or retention of their property, rights or interests in Allied or Associated States.'

"The preamble to the treaty of Berlin includes in full the provisions of sections 1, 2 and 5 of the joint resolution of Congress approved July 2, 1921, section 5 of which provides that all property of German nationals held by the United States Government 'shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * or successors, shall have * * * made suitable provision for the satisfaction of all claims against said Government.' Article II of this treaty provides that the rights and advantages stipulated in Part X of the treaty of Versailles shall be enjoyed by the United States, but that 'in availing itself of the rights and advantages stipulated' in the treaty of Versailles the United States 'will do so in a manner consistent with the rights accorded to Germany under such provisions.'

"It is apparent that the language of the preamble to the treaty of Berlin under which the United States reserves the right to retain the property until suitable provision has been made for the settlement of American claims is inconsistent with its rights under Article II of the treaty which, by reference to Part X of the treaty of Versailles, specifically gives the United States the right to liquidate the property and to apply the proceeds to payment of claims of American nationals against the German Government."

And the Committee concluded as to the treaties:

> "The only interpretation which will reconcile these provisions is that the United States specifically reserved the right to use the German property for the settlement of American claims *only if suitable provision were not made by the German Government for the settlement of American Claims.* And Congress has reserved to itself the decision of this question." (Italics ours.)

Then after showing the provisions which had been made by Germany, the Committee explains the Act in detail, including the provision for the immediate return of eighty per cent. upon the agreement of the owner to the retention and use by the United States of the remaining twenty per cent. The clear intent, purpose and expression of the Committee was that the provisions which had been made for the payment of claims of American nationals were suitable and that, therefore, the obligation of the United States was to provide for the immediate return of so much of the property, to wit 80%, as was justified under the agreement which had been made.

(b) By the Settlement of War Claims Act of March 10, 1928, Congress definitely, finally, and conclusively carried out the policy of non-confiscation and definitely, finally and conclusively gave to the owners of the property a right to the immediate return of eighty per cent. of their property.

As hereinbefore stated the settlement was one which had the approval of the German owners and the American

claimants and the Committee in charge of the Bill not only called attention to such agreement but clearly advised that it was the intent and purpose of the Bill to carry the agreement into effect and that, in doing so, Congress was determining that the suitable provisions for the payment of American claims, which Germany was obliged to make under the Treaty of Berlin had been made and that, by the Bill, Congress was fulfilling the agreement of the United States, under the Treaty, to release the property.

The Act itself shows conclusively that such purpose was absolutely effected and that, by it, all dominion and control over eighty per cent. of the property was surrendered by Congress and that whatever right or title the United States had theretofore had therein was given up and again fully and completely vested in the owners.

(b-1) THE STATUTE AND RESPONDENT'S COMPLIANCE THEREWITH.

The Settlement of War Claims Act (45 Stat. 254), which is entitled—

> "An Act to provide for the settlement of certain claims of American nationals against Germany, Austria, and Hungary, and of nationals of Germany, Austria, and Hungary, against the United States, and for the ultimate return of all property held by the Alien Property Custodian.",

contains an amendment to Section 9 of the Trading with the Enemy Act.

Section 11 of the Settlement of War Claims Act provides that subsection (b) of Section 9 of the Trading with

the Enemy Act should be amended so that subsection (b), omitting immaterial parts, shall read as follows:

> "(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was——
>
> * * *
>
> "(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m)* has been filed.
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> * * *

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*NOTE: Subsection (m) of Sec. 9 referred to in paragraph (13) above, is a provision of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, providing as follows, omitting the immaterial parts:

> "(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return), as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25."

Section 25 provides for the investment out of the funds held by the Alien Property Custodian by the Treasurer of the United States in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of that section.

> "Then the President, *without any application being* made therefor, may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid over to the Alien Property Custodian; * * *." (Italics ours.)

These provisions are followed by subsection (c) of Section 9 of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, which section reads as follows:

> "(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. * * *"

Therefore subsection (c) authorizes former enemy owners to proceed under subsection (a) of Section 9 of the Trading with the Enemy Act, which theretofore had been confined to non-enemy claimants.

Subsection (a) of Section 9, omitting the immaterial parts, provides:

> "That any person not an enemy or ally of enemy claiming any interest, right, or title in any money

> or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title * * * so claimed, and if so established *the court shall order the payment*, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States." (Italics ours.)

In other words we have a direction for the immediate return of the property, seized by the Custodian, to its German owners, providing they consent to the postponement of the return of an amount equal to 20% of the property.

In this case in paragraph 9 of the complaint (R. 2) it is alleged that the respondent has filed a notice of claim containing such particulars as required by law, which means that the respondent has filed a consent under subsection (m) of Section 9 of the Trading with the Enemy Act to the postponement of the return of an amount equal to 20% of the value of the property seized.

In other words, the *Court* is directed by this legislation to return the property if the President does not return it through the Custodian administratively. Thus the former enemy owner is entitled to receive from the court, when his action is brought, a direction for the immediate return of his property provided he files the consent to the postponement of the return of the 20%.

It follows from the above that the respondent herein was, on March 10, 1928, entitled to the return of 80% of the property formerly belonging to it and seized by the United States Government.

Being entitled to such immediate return the question arises—How can Congress, having directed such immediate return, 95% having already been returned, deprive the respondent, part owner of the remaining 5%, of that which it has thus recognized as respondent's property? (See Reports of Alien Property Custodian, H. R. Doc. 543, 1930 and H. R. Doc. 133, 1933.)

After March 10, 1928 the Alien Property Custodian no longer held the property, for the return of which this suit is brought, for the United States but for the exclusive benefit of the respondent. The capacity of the Alien Property Custodian was definitely changed by the Settlement of War Claims Act of 1928.

Upon the enactment of the Settlement of War Claims Act the owners of the property seized were given the right to the immediate possession of their property upon submitting proper proof of ownership and consent to the temporary withholding of 20% thereof. From their property the Alien Property Custodian was authorized to withhold only 20% (temporarily), taxes and the amount of "necessary expenses".

In the complaint it is alleged (Par. 10) (R. 2) that prior to the commencement of the action the Alien Property Custodian determined that the respondent herein was the owner of said property and entitled to the return of said property as provided by the Trading with the Enemy Act as amended by the Settlement of War Claims Act.

It is clear, therefore, that respondent having complied with all the provisions of the Act, was, under the Act, entitled to the immediate return of eighty per cent. of its property.

(b-2) THE VARIOUS PROVISIONS OF THE SETTLEMENT OF WAR CLAIMS ACT INDICATE THAT THE UNITED STATES GOVERNMENT INTENDED TO PART WITH EVERY AND ALL INTEREST IN THE SEIZED PROPERTY EXCEPT THE 20% "TEMPORARILY" WITHHELD AND THE AMOUNT RESERVED FOR EXPENSES.

Numerous provisions of the Trading with the Enemy Act as amended by the Settlement of War Claims Act, indicate that Congress intended to surrender all of the rights of the United States Government in and to the property seized.

Thus by Section 25 (e), added to the Trading with the Enemy Act by Section 10 of the Settlement of War Claims Act, the Secretary of the Treasury was directed to issue to the Custodian 5% interest bearing certificates representing such 20% deductions, and also non-interest bearing certificates representing the claimants' interest in the so-called unallocated interest fund, which included accumulated interest derived prior to March 4, 1923 from invested cash of former enemies, the repayment of which was postponed. (See Sec. 28 of the Settlement of War Claims Act.)

Section 25 (e) subdivision (2) contains the following provisions with regard to these participating certificates:

> "(2) Such certificates shall not be transferable, except that the Alien Property Custodian may transfer any such participating certificate evidencing the interest of a substantial number of the *owners* of the money invested, to a trustee duly appointed by such *owners*." (Italics ours.)

The evident purpose of this provision was that the owners could obtain from some bank or bankers or other persons, advances upon the security of these certificates. This is the strongest evidence that Congress intended to divest the United States Government completely of any interest in the property, not only that returnable outright, but even that "temporarily" withheld. It must be remembered that the fund of some $35,000,000 representing the 20% "temporarily" withheld from its recognized owners, was paid into the Special Deposit Account for distribution to the American claimants, so that this money was not actually retained by the United States. The expression "temporarily" withheld appears also in Section 25.

Section 25 (a) subdivision (2) contains the following sentence:

> "(2) When in the case of any trust written consent under subsection (m) of section 9 has been filed, an amount equal to the portion of such trust the return of which is temporarily postponed under such subsection shall be credited against the investment made under paragraph (1) of this subsection."

Thus, the retention of 20% was only a "temporary" matter, whereas the balance of 80% was to be returned immediately.

By Section 9 (m), added to the Trading with the Enemy Act by Section 14 of the Settlement of War Claims Act, it is provided that claimants of designated classes before receiving their property must "consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value thereof". Therefore the "amounts so deducted shall be returned to the persons *entitled thereto* as provided in subsection (f) of section 25."

By Section 30, added to the Trading with the Enemy Act by Section 15 of the Settlement of War Claims Act, it is provided that any property returnable under subsection (b) or (n) of section 9 of the Trading with the Enemy Act, which includes property of former enemy owners, shall be subject to attachment on suits brought against the owners.

If, therefore, the 80 per cent. was attachable by third parties, there can be no doubt that it was property *vested* in the Germans. For, if the United States had reserved even the faintest rights thereto, it could not have been attached as property of the Germans.

By Section 24 (b), added to the Trading with the Enemy Act by Section 18 of the Settlement of War Claims Act, it is provided that income, war-profits, excess-profits, or estate taxes imposed by any Act of Congress, shall be computed as if the property had not been seized by the Custodian but had been held at all times by the alien owners themselves.

Other provisions of the Settlement of War Claims Act, aside from its title, show numerous provisions consistent only with the revesting of title in the original owner. Among these are:

Authorization to the Custodian to withdraw outstanding demands for enemy property upon receiv-

ing 20% thereof (Sections 29 (a), 29 (b)), thus relinquishing *even the seizure* of the 80%.

References to the former enemy as the person *"entitled"* thereto or *"owners"* (subdivisions m and p of Section 9; Section 25 (e), subdivision 2; Section 26 (b), subsections (d), (g), (j) of Section 9).

That the enemy may receive its entire property if, to avoid a sale thereof, he pays 20% to the Custodian (subsection m. of Section 9). *To permit him to pay 20% without giving him the property would constitute a positive fraud by the United States.*

Even the full income from March 4, 1923 was directed to be paid the former enemy out of property "held in trust for such person" (Section 23), as well as his proportion of the unallocated Treasury interest (Sections 26 a, b, c).

These provisions are a clear demonstration that Congress recognized the rights of the aliens as owners of the property, and that they were to be vested, upon the passage of the Act, with complete owners' interest in the property returned.

Petitioners contend that because, as held by this Court in the case of *Woodson* v. *Deutsche G. und S. Scheideanstalt,* 292 U. S. 449, there was in the original Trading with the Enemy Act and amendments thereto a reservation to tax expenses incurred by the Custodian in administering the property while in his possession, Congress must therefore have reserved unto itself the right to enact Public Resolution 53.

In that case this Court recognized that Congress intended to make these reservations for the payment of expenses, because there had been an express reservation in the original Trading with the Enemy Act, and amendments thereto, and therefore held that as to the 2% retained for the expenses there was no vested right infringed. On this subject this Court said as follows (p. 454):

> "The original act, coupled with the later Acts of March 4, 1923, and May 16, 1928, plainly discloses a reservation to Congress of power to appropriate the property seized or its proceeds, *as far as might be deemed necessary, to the payment of expenses incurred in the seizure and subsequent administration.* The funds here in question are proceeds which were deducted for that purpose *when payments were made from time to time to the enemy owner.* As respects property or proceeds so retained by the Custodian there is no room to doubt that Congress had full power to cause it to be applied to the payment of such expenses. And, of course, Congress had ample power to ratify deductions made by the Custodian to cover such expenses. This is in effect what was done by the Act of March 28, 1934. True, it forbade the commencement or maintenance of a suit to recover funds so deducted, but this merely reflects and emphasizes the purpose to sanction and ratify the deductions by the Custodian, and in such circumstances does not deprive the respondent of any *vested* interest." (Italics ours.)

The necessary inference, from the fact that this Court held that because of the original reservation in the Trading with the Enemy Act, and in the Acts of March 4, 1923 and May 16, 1928 there had been these reservations, is that

the owners were entitled to the return of the balance of the property not thus reserved for expenses, and therefore, as to the balance these owners must have a vested interest.

It is only with respect to the reservations made by Congress that this Court held there was no vested interest. As to the balance this Court's opinion implies that the owners have a vested interest. This confirms the conclusion which the legislative history of the transaction amply demonstrates.

(b-3) THE DEBT-FUNDING AGREEMENT OF 1930 EMPHASIZES THE INTENT OF CONGRESS TO REVEST IN THE OWNERS FULL AND ABSOLUTE TITLE IN THE PROPERTY BY THE SETTLEMENT OF WAR CLAIMS ACT OF 1928.

We have hereinbefore (*supra*, pp. 18-21) pointed out that by the Debt-Funding Agreement of 1930, the United States agreed to accept the full faith and credit of Germany "as the only security and guaranty" for the payment of Germany's war obligations to the United States; that it accepted the bonds of Germany as the evidence of such payment; that it still holds, and has not surrendered, such bonds; and that it agreed to the release of all property which Congress had directed to be released by the Settlement of War Claims Act of 1928.

We there pointed out and we here again emphasize that that Agreement and the terms thereof forces the inescapable conclusion that Congress, by the Settlement of War Claims Act intended to provide and did provide for the divesting of every possible interest of the United States in the property returnable thereunder and that it intended to and did

provide for the removal of every possible cloud upon the title of the owners therein.

(c) The Settlement of War Claims Act vested in the former owners an immediate right to the return of their property and the owner having complied with the provisions of the Act, cannot be deprived of his vested right therein.

We have hereinbefore pointed out that it was the intention of Congress that the German owners should obtain the immediate return of their property, subject only to the deductions for expenses, taxes and the 20% "temporarily" withheld.

The Government now contends that this return was an act of grace similar to the grant of bonuses and pensions.

(c-1) RESPONDENT'S INTEREST IN ITS PROPERTY WAS NOT COMPLETELY AND IRREVOCABLY DESTROYED.

Since, as we have shown hereinbefore, the property was not and was not intended to be confiscated and since the entire purpose and intent of this Government has been to merely hold the property or its proceeds for ultimate return to the owners thereof, it is, we submit, entirely erroneous to interpret the decisions of this and other courts to mean that the title to and control of the property gained by the United States completely and irrevocably destroyed every possible interest of the owners therein. Decisions are to be read in the light of the facts and circumstances under which they are made. Cases in which the control of Congress has been attacked and in which nothing had intervened to show a relaxation or modification of such control are, we submit, to be distinguished from a case

where something has intervened to establish an interest theretofore unenforceable.

This Court and other courts have, it is true, stated in varying language the paramount control of Congress over alien property and, in doing so, they have stressed such control to the exclusion of the owner. But it is apparent that the cases wherein the statement appears were entirely different from a case, such as this, where a vested interest has been obtained in the property. The cases cited by petitioners are clearly not in point. Thus, in the case of *Klein* v. *Palmer,* 18 F. (2d) 932, the owners sought to set aside a sale of property made by the Alien Property Custodian. In the case of *Crone* v. *Sutherland,* 63 F. (2d) 895, the plaintiff challenged the right of the Custodian to deduct 2% from her claim for expense of administration. In the case of *Commercial Trust Co.* v. *Miller,* 262 U. S. 51, a trustee sought to have the rights to property adjudicated before possession could be asserted by the Alien Property Custodian. In the case of *United States* v. *Chemical Foundation,* 272 U. S. 1, the suit was to set aside a sale of patents made by the Alien Property Custodian. In the case of *Woodson* v. *Deutsche, etc. Vormals,* 292 U. S. 449, plaintiff sought to recover 2% expenses which had been deducted by the Alien Property Custodian, notwithstanding a statute which prohibited recovery of such deductions.

Is it not clear that the principle here involved is in no way analogous to the questions involved in those cases? No doubt the enemy owners could not question the right of Congress to confiscate the property had it so willed. Nor could they question the right of Congress to sell the property or to deduct 2% therefrom for expenses or to seize the property without previous adjudication of ownership.

They could not, because the United States had complete control over the property to the exclusion (until Congress acted) of the power of the owners of the property judicially to assert and vindicate their rights therein.

But such cases are far different from a case where Congress, in the exercise of its complete control has determined that the purpose for which the property is held no longer exists and ordains the return of the property to the owners under conditions with which the owners complied. In other words, the ownership was never denied by Congress but could not be asserted without the permission of Congress. Only control, not interest of the owners, was for the time being divested. But such control was as clearly revived by the Settlement of War Claims Act.

The distinction was recognized in the case of *Commissioner of Internal Revenue* v. *Stearns*, 65 F. (2d) 371, in which certiorari was denied by this Court October 16, 1933 (290 U. S. 670). The decision there reached could not possibly have been made without the recognition of an interest in the property by the owner. The Court stated (p. 374):

> "Apparently seizure changed 'title'; it was the substitute for the voluntary act by which the property might be 'conveyed, transferred, assigned, delivered, or paid'. * * * . The custodian had the powers of a 'common-law trustee' * * *, which cannot without undue strain be supposed to go without the legal title on which such powers ordinarily depend".

and then the Court stated (p. 374):

> "*But even though we grant so much, the beneficial interest need not pass,* and section 12 itself shows that there was no purpose at the time that it

> should; for it was enacted that all enemy claims to 'property received and held * * * shall be settled as Congress shall direct'. No doubt the power to confiscate was held in reserve, but it was not exercised and might never be. In fact it never was, except in small part. That this was the general intent, the reports of the two Houses amply disclose * * *. The contrary would have violated international usage of at least one hundred years". (Italics ours.)

As was stated by the Court below (R. 24-25):

> "At the risk of unnecessary repetition, we repeat what we have already said, namely, that we fully recognize that the war powers of the United States gave them the right to confiscate the property of an enemy found in this country; but we assert, as equally true, that there can be no confiscation of enemy property, in the sense that title is changed and the rights of the original owner destroyed, without an Act of Congress to that effect. The declaration of war is not such an act. It has never been held that a state of war operated of itself and by its own force to accomplish a transfer of the title of property. *Brown* v. *The United States*, 8 Cranch, 110."

(c-2) THE SETTLEMENT OF WAR CLAIMS ACT WAS AN ACT UNDER WHICH RESPONDENT COULD AND DID OBTAIN A VESTED INTEREST IN ITS PROPERTY.

Petitioners contend that the return provided for in the Settlement of War Claims Act was such as to make applicable here the principle laid down in cases involving gratuities, pensions, etc., that such are not protected by the Fifth Amendment to the Constitution.

That one cannot obtain a vested interest, protected by the Fifth Amendment to the Constitution, in a pension or a gratuity is a principle too well settled to permit of debate. But, that the return of property under the Settlement of War Claims Act is not in any way analogous to a pension or gratuity as governed by the principle is equally clear.

Petitioners cite the cases upon which they rely and we submit that an analysis of them does not even remotely sustain their conclusion that this is a case in which the principle applies.

The cases of *United States* v. *Teller*, 107 U. S. 64 and *Frisbie* v. *United States*, 157 U. S. 160, each involved pensions and in each of them this Court held, as stated in the *Teller* case (p. 68):

> "No pensioner has a vested legal right to his pension. Pensions are the bounties of the government, which Congress has the right to give, withhold, distribute, or recall, at its discretion".

In the case of *United States* v. *Cook*, 257 U. S. 523, this Court said (p. 527) that cases in which pensions are involved:

> "* * * merely establish that Congress in shaping the form of its bounty may impose conditions and limitations on its acquisition and enjoyment by the beneficiaries which it could not impose on the use and enjoyment by them of a vested right".

In re Hoag, 227 Fed. 478, and *In re Goodwin*, 57 F. (2d), 31, each involved pensions to which the courts held there could be no vested right. And *Field* v. *Giegengack*, 73 F. (2d) 945, involved a right to leave of absence by a

Government employee and the Court held that such leave is a privilege in which there could not be a vested right:

It is at once apparent that such cases cannot have any application here. There the claimants were the recipients of the bounty of the United States; no property of theirs was involved; what they were receiving was not their own property which the United States had seized or received, but was the property of the United States, derived from the revenues of the United States and gratuitously given to them by the United States. Here we are dealing with property belonging to this respondent, which was sequestered as a war measure, which was never intended to be and never was confiscated by the United States, which was held and administered as trust property belonging to respondent, against which claims of the respondent could eventually be pressed, and as to which Congress eventually by the Settlement of War Claims Act carried into effect its consistent determination to return to respondent. Obviously, there is a wide difference between a pension or gratuity of the United States, paid out of the revenues of the United States, and gratuitously given therefrom by the United States and a return of property to an owner from whom it was seized, for whom it has been held and administered, and which never was a revenue or became a part of the funds or property of the United States.

Petitioners say (Brief pp. 32-33) that "it was an act of grace for Congress in the early amendments to the Trading with the Enemy Act and in the Settlement of War Claims Act of 1928, to authorize a partial return of the property" and they cite the cases which they say sustain the point. It should be noted that we are here concerned with rights which respondent obtained under the Settlement of War

Claims Act of 1928; there is no question here involved as to its rights under previous statutes. Neither in the case of *Kogler* v. *Miller*, 288 Fed. 806, which was decided on May 2, 1923, nor in the case of *U. S.* v. *White Dental Co.*, 274 U. S. 398, which was decided on May 16, 1927, was there nor could there have been involved any rights under the Settlement of War Claims Act of 1928.

The case of *Chemische Fabrik von Heyden* v. *Tait*, 64 F. (2d) 295, was to recover income and excess profits taxes deducted and paid from enemy property. Both the lower court (58 F. (2d) 814) and the Court of Appeals (64 F. (2d) 295) pointed out that the taxes were properly deductible under Section 18 of the Settlement of War Claims Act (Subsections b and c of Section 24 of Trading with the Enemy Act, 50 U. S. C. A. Appendix). The Court said (64 F. (2d) 296) in quoting the Court below:

> "In the view I take of the matter the dominant and controlling consideration is that the 'Settlement of War Claims Act' was an act of grace of the sovereign United States, and in returning the property this Government undoubtedly had the clear right to impose such terms and conditions as it pleased Congress to enact."

In the case of *Krausz* v. *United States*, 14 F. Supp. 291, decided by the Court of Claims, there was involved the question of the assessment and collection of taxes on enemy property. The Court stated that until the law made provision for the return, the owners had no enforceable rights in the property and then stated (p. 294):

> "Whatever rights the former owners subsequently obtained were through and under the War

> Claims statute which was purely an act of grace on the part of our government."

and that:

> "We have already shown that *until the War Claims Act became a law* the former owners of the property seized had no enforceable rights whatever therein, and when the act was passed they acquired no rights *except those granted thereby*". (Italics ours.)

and the Court held that under the express provisions of the Settlement Act, the taxes were assessable and collectible. It is to be noted, however, that, while the Court describes the statute as "an act of grace", it recognizes and holds that, under it, the owners gained enforceable rights in the property as granted by the statute.

In neither of these cases of *Chemische Fabrik von Heyden* v. *Tait, supra,* or *Krausz* v. *United States, supra,* is there the slightest reference to the provisions of Section 5 of the Knox-Porter Peace Resolution of July 2, 1921 nor the Treaty of Berlin of August 25, 1921, in which said Section 5 is incorporated. In view of the fact that the United States solemnly agreed in the Treaty of Berlin to release the property when Germany made "suitable provision" for the satisfaction of American claims and in view of the fact that the Settlement of War Claims Act was the result of such "suitable provision", it seems clear that, had the Courts had before them such provision of the Peace Resolution and the Treaty, they would not have used the words "purely an act of grace" and thereby import no obligation whatever upon the part of the United States. And, indeed, the Court of Claims in the *Krausz* case specifically states

that the owners had "enforceable rights" when "the War Claims Act became a law", language which, we submit, imports much more than "an act of grace".

But neither of the cases affords the slightest basis for the conclusion that a vested interest could not be obtained in the property by an owner who complied with the conditions of the Act. On the contrary, the decisions recognize the right under the conditions of the Act. In neither of them is there the slightest intimation that the rights which a claimant obtained under the Act were determinable on principles applicable to pensions and gratuities. The Settlement of War Claims Act was an act dealing with property of friendly aliens and not with property of the United States derived from the revenues of the United States. Certainly the rights of owners who have complied with the terms of the Act rest on much firmer ground than do acts for pensions and gratuities and certainly, too, should those affected thereby have the protection of the Constitution against the deprivation of their own property without due process of law.

(c-3) THE RETURN OF THIS PROPERTY IS CONGRESSIONAL RECOGNITION OF AN ABSOLUTE LEGAL AND MORAL RIGHT BASED UPON INTERNATIONAL LAW.

The contention of the petitioners that this return was an act of grace similar to the grant of bonuses and pensions, leaves out of sight the fact that the basis of the return of this property is Congressional recognition of an absolute legal and moral right based upon international law.

Our greatest authority on International Law, John Bassett Moore, in his Digest of International Law (Vol.

VII, 312-313), stated, in discussing Chief Justice Marshall's professed distinction between a right and the exercise of a right:

> "Referring to the practice of nations and the writings of publicists, he declared that, according to the 'modern rule tangible property belonging to an enemy and found in the country at the commencement of war, ought not to be immediately confiscated'; that 'this rule' seemed to be 'totally incompatible with the idea that war does of itself vest the property in the belligerent government'; and consequently, that the declaration of war did not authorize the confiscation. Since effect was thus given to the modern usage of nations, it was unnecessary to declare, as he did in the course of his opinion, that 'war gives to the sovereign full right to take the persons and confiscate the property of the enemy, wherever found,' and that the 'mitigations of this rigid rule which the humane and wise policy of modern times has introduced into practice' though they 'will more or less affect the exercise of this right,' 'can not impair the right itself.' Nor were the two declarations quite consistent. *The supposition that usage may render unlawful the exercise of a right, but can not impair the right itself, is at variance with sound theory.* Between the effect of usage on rights, and on the exercise of rights, the law draws no precise distinction. A right derived from custom acquires no immutability or immunity from the fact that the practices out of which it grew were ancient and barbarous. We may, therefore, ascribe the dictum in question to the influence of preconceptions, and turn for the true theory of the law to an opinion of the same great judge, delivered twenty years later, in which *he denied the right of the conqueror to confiscate private property.*

> on the ground that it would violate 'the modern usage of nations *which has become law.*' (*United States* v. *Percheman*, 7 Peters, 51.)" (Italics ours.)

Furthermore, we have indicated that all this property remained here, after President Wilson, on February 8, 1917, promised that it would not be confiscated. We have before us in the Settlement of War Claims Act, legislation carrying out this promise made by President Wilson and we have the Debt-Funding Agreement of 1930 in which this country agreed to look to Germany and not to alien property for the satisfaction of Germany's war obligations to the United States. Therefore, the return of the property is not a mere act of grace but the carrying out of a solemn promise made pursuant to international law and United States policy.

If the return of the property is not a mere act of grace, then the return of such property must be regarded as vesting in the owner an immediate right of enjoyment.

That the satisfaction of a claim, having its foundation in international law, is not a mere act of grace, was indicated in the case of *Williams* v. *Heard*, 140 U. S. 529, 11 S. Ct. 885. In that case this Court held that the Act of Congress of June 5, 1882, providing for the distribution of the unappropriated moneys from the Geneva award for the payment of claims caused by the infraction of international law by the English Government due to the Alabama incident, and directing the examination of the claims and the payment of premuims for war risks, was not a mere donation but the effectuation of the payment of claims which existed before the passage of the Act of Congress.

In that case the Court held that the right to receive this payment provided for by Congress was a vested property right passing to the estate in bankruptcy of the claimant.

This Court, in *Williams* v. *Heard, supra,* adopting the ruling in the cases of *Comegys* v. *Vasse,* 1 Peters, 193, and *Phelps* v. *McDonald,* 99 U. S. 298, and adopting the language of Mr. Justice Swayne in the case of *Phelps* v. *McDonald, supra,* said at 544:

> " 'There is no element of a donation in the payment ultimately made in such cases. Nations no more than individuals make gifts of money to foreign strangers. Nor is it material that the claim cannot be enforced by a suit under municipal law which authorizes such a proceeding. In most instances the payment of the simplest debt of the sovereign depends wholly upon his will and pleasure. The theory of the rule is that the government is always ready and willing to pay promptly whatever is due to the creditor. * * * It is enough that the right exists when the transfer is made, no matter how remote or uncertain the time of payment. The latter does not affect the former. * * * If the thing be assigned, the right to collect the proceeds adheres to it, and travels with it withersoever the property may go. They are inseparable. Vested rights *ad rem* and *in re*—possibilities coupled with an interest on claims growing out of property—pass to the assignee.' 99 U. S. 303, 304. To the same effect are *Erwin* v. *U. S.,* 97 U. S. 392; *Bachman* v. *Lawson,* 109 U. S. 659, 3 Sup. Ct. Rep. 479."

Thus, it may be regarded as firmly established that the payment of these claims, and similarly the return of the property herein, cannot be regarded just as a mere act of grace of a sovereign.

The property of the German owners remained here by reason of the promise of the sovereign, and under the circumstances, the fulfillment of the promise not to confiscate but to return it must be regarded not as an act of grace but the performance of a clear moral duty. When this promise is carried out it cannot be regarded as a promise with, so to speak, strings attached to it. Consequently, the Act of Congress, embodied in the Settlement of War Claims Act, must be regarded as creating a vested right.

The recognition of a moral duty has from time immemorial been regarded as sufficient consideration for a promise based upon such moral duty without further payment of consideration.

Thus, a debt that has been discharged in bankruptcy, when afterwards recognized by a written promise to pay, becomes a new obligation without further consideration. This Court in *Zavelo* v. *Reeves*, 227 U. S. 625, said at page 629:

> "It is settled, however, that a discharge while releasing the bankrupt from legal liability to pay a debt that was provable in the bankruptcy, leaves him under a moral obligation that is sufficient to support a new promise to pay the debt."

(c-4) THE CASES OF *United States* v. *Cook*, 257 U. S. 523, AND *United States* v. *Realty Co.*, 163 U. S. 427, ASSERT A PRINCIPLE WHICH MAY BE APPLIED HERE.

The Court below has forcefully pointed out in its discussion of the cases of *United States* v. *Realty Co.*, 163 U. S. 427 and *United States* v. *Cook*, 257 U. S. 523, the distinction which exists between cases involving pensions

and gratuities and cases where there are claims of "an equitable, moral, or honorary nature". (See R. 15-18).

And we emphasize what the Court stated (R. 18):

> "* * * It cannot, we think, be contended that the seizure of itself and without more transferred ownership and destroyed title. The seizure, of course, transferred control, and the rights of the owner were in abeyance until Congress elected either to confiscate or to return. But having exercised the option, having renounced the power to hold the property, having declared the terms on which it would restore possession, and those terms being complied with by the former owner, we think it must be decided that its war power is exhausted. Certainly this is true of the property actually delivered, and, if true as to that, it seems to us in principle it is also true as to that which was withheld subject only to the condition that the title as against an adverse claimant should be established. In both cases the United States unqualifiedly renounced the exercise of its war power of confiscation and re-established title in the former owner, and it is too late now to have recourse to that power to take back rights which it has by formal act restored."

(d) The Settlement of War Claims Act conferred upon respondent the statutory right to the immediate return of eighty per cent. of its property and respondent, having consented to the acceptance of eighty per cent. thereof and to the retention of twenty per cent. thereof, obtained a vested right therein of which it cannot constitutionally be deprived by Public Resolution 53 of June 27, 1934.

We have hereinbefore pointed out that Section 12 of the Trading with the Enemy Act specifically provided

that "after the end of the war any claim of any enemy" to the property "shall be settled as Congress shall direct"; that "after the end of the war", by the Settlement of War Claims Act of March 10, 1928, Congress provided "for the ultimate return of all property held by the Alien Property Custodian"; that the Act provided for the immediate payment of eighty per cent. of the property and the "temporary" postponement of the payment of the remaining twenty per cent. thereof.

We also pointed out and here emphasize that this claimant is of the class described in subsection 13 of Section 11 of the Settlement of War Claims Act and that as such claimant it could not obtain the return of eighty per cent. of its property unless it filed "a written consent to a postponement of the return of an amount equal to twenty per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return) as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of Section 25", as provided in subsection (m) of Section 14 of the Act. We also pointed out herein and alleged in the Bill of Complaint, the fact, which has not been and cannot be denied that respondent had complied with all the provisions of the Act, including the filing of such consent, long prior to the passage of Public Resolution 53 of June 27, 1934.

By the Act, Congress "directed" the return of eighty per cent. of its property to respondent and gave it full and complete statutory right to such return. Pursuant to that statutory right, respondent acted and performed every act, including that of filing a consent to the postponement of the payment of twenty per cent. of its property and of agreeing to accept but eighty per cent. thereof. *We submit*

that in such circumstances, the right of respondent to the return of eighty per cent. of the property was fixed by the law in force when it filed its consent to the postponement of the payment of twenty per cent. of its property and to the use of such twenty per cent. by the United States for the purposes set forth in the Act and the right so vested cannot be defeated by Public Resolution 53 of June 27, 1934.

When consideration is given to the fact that Congress at no time evidenced any purpose or intent, as to the ultimate disposition of the property other than to return it to its owners and that it always and consistently treated the property as belonging to the original owners thereof and that the purpose, intent, and action of Congress was, by the Settlement of War Claims Act, to immediately return 80 per cent. of the property to such owners, we think it follows that Congress, by such Act, absolutely surrendered all dominion and control over the same and could not by the subsequent Resolution again assume dominion and control over it.

But, assuming, *arguendo*, that such is not the law, *there certainly is no possible escape from the proposition that, when the statutory right was given and the parties had acted in compliance with and under authority of the statute, then and in that event respondent enjoyed a vested right which could not be defeated by the Resolution.*

In the case of *Steamship Company* v. *Joliffe*, 2 Wall. 450, according to a California statute, where a pilot licensed under statute had tendered his services to a vessel out of port and such services were refused, such pilot was entitled to half-pilotage fees allowed by statute in such cases. After tendering these services the statute was repealed, and it was claimed that by reason of this repeal the pilot was not

entitled to recover the half-pilotage fees, but Mr. Justice Field, writing the opinion of this Court, said (pp. 457-458):

> "* * * When a right has arisen upon a contract, or a transaction in the nature of a contract authorized by statute, and has been so far perfected that nothing remains to be done by the party asserting it, the repeal of the statute does not affect it, or an action for its enforcement. It has become a vested right which stands independent of the statute."

Certainly, there was and could have been no enforceable claim for mere tendered services, in the absence of statute, but under the statute a right to fees for such services was created. So also in this case, if it can be said that respondent had no enforceable claim for a return of the property prior to the Settlement Act, it certainly was given the right to the return of 80% thereof under the Act. In the *Joliffe* case, the pilot had tendered his services, for which tender he became entitled, under the statute, to the fees. So also in this case, respondent filed its claim and consented to the retention of 20% of the property and the use thereof by the United States, for which consent he became entitled, under the statute, to the immediate return of 80% of the property. In the *Joliffe* case, the Court held that by the tender of the services a right arose upon a contract and that that right was a vested right which could not be defeated by the repeal of the statute which provided for the fees. So also in this case, by giving the consent, a right arose upon a contract and that right is a vested right which cannot be defeated by Public Resolution 53.

In the case of *Ettor* v. *Tacoma*, 228 U. S. 148, the State of Washington had, by legislation, given to abutting owners

compensation for consequential damages growing out of an original street grading made under municipal direction. After the plaintiffs' damage had occurred a law was passed repealing such legislation. This Court said:

> "The necessary effect of the repealing act, as construed and applied by the court below, was to deprive the plaintiffs in error of any remedy to enforce the fixed liability of the city to make compensation. This was to deprive the plaintiffs in error of a right which had vested before the repealing act,—a right which was in every sense a property right. Nothing remained to be done to complete the plaintiffs' right to compensation except the ascertainment of the amount of damages to their property. The right of the plaintiffs in error was fixed by the law in force when their property was damaged for public purposes, and the right so vested, can not be defeated by subsequent legislation. *Elgin* v. *Eaton*, 83 Ill. 535; *Healy* v. *New Haven*, 49 Conn. 394; *Harrington* v. *Berkshire*, 22 Pick. 263; *People ex rel. Fountain* v. *Westchester County*, 4 Barb. 64, are cases arising under street or highway statutes. The principle has been applied in reference to rights accruing under a variety of statutes when affected by a subsequent change of the law. *Pacific Mail S. S. Co.* v. *Joliffe*, 2 Wall. 450; *Miller* v. *Union Mill Co.*, 45 Wash. 199; *Grey* v. *Mobile Trade Co.*, 55 Ala. 388; *Stephens* v. *Marshall*, 3 Pinney (Wis.) 203; *Gorman* v. *McArdle*, 67 Hun. 484, 22 N. Y. Supp. 479; *Westervelt* v. *Gregg*, 12 N. Y. 202; *Creighton* v. *Pragg*, 21 Cal. 115; *State Trust Co.* v. *Kansas City P. & G. H. Co.*, 115 Fed. 367."

The Court very clearly pointed out that the damages which Ettor had suffered were "consequential damages" and that, in the absence of the statute, there was no liability for such

damages (p. 150), but the Court also pointed out that the statute created the liability for such damages (p. 151). So also in this case, if it can be said that prior to the Settlement Act respondent was not entitled to the return of the property, it was given the right to such return by the Settlement Act. In the *Ettor* case, the Court pointed out that the damage had been done and nothing remained to be done except the ascertainment of the amount of such damage. So also in this case, respondent complied with all the provisions of the statute, including that of giving the consent, and nothing remained to be done except the delivery of 80% of the property to it. In the *Ettor* case, the Court held that the right of Ettor to his damages was fixed by the law in force when his property was damaged and that such right was then a vested right which could not be defeated by subsequent legislation. So also in this case, the right of respondent to the return of 80% of the property was fixed by the law in force when it consented to the postponement of the return of 20% thereof and the use of the same by the United States and such right was then a vested right which could not be defeated by the "subsequent legislation" to wit, Public Resolution 53.

In *Coombes* v. *Getz*, 285 U. S. 434, the following facts appeared: The California constitution contained a section providing that directors of corporations should be liable to creditors for all moneys embezzled or misappropriated by corporate officers. Another section reserved in the legislature the power to alter or repeal any further laws concerning corporations. Plaintiffs, who had contracted with the corporation while these provisions were in force, brought suit to enforce the constitutional liability against the defendant, a director of the corporation, for money misap-

propriated by officers of the corporation. While this action was pending, the legislature repealed the section making the directors liable. This Court held that the statute repealing this section was unconstitutional as to the plaintiffs, on the ground that it contravened both the contract impairment clause and the due process clause of the United States Constitution. The opinion in that case delivered by Mr. Justice Sutherland, contained the following language (p. 442):

> "The right of this petitioner to enforce respondent's liability had become fully perfected and vested prior to the repeal of the liability provision. His cause of action was not *purely* statutory. It did not arise upon the constitutional rule of law, but upon the contractual liability created in pursuance of the rule. Although the latter derived its being from the former, it immediately acquired an independent existence competent to survive the destruction of the provision which gave it birth. The repeal put an end to the rule for the future, but it did not and could not destroy or impair the previously vested right of the creditor (which in every sense was a property right, *Ettor* v. *Tacoma*, 228 U. S. 148, 156; *Pritchard* v. *Norton*, 106 U. S. 124, 132) to enforce his cause of action upon the contract. *Ettor* v. *Tacoma, supra; Hawthorne* v. *Calef*, 2 Wall. 10; *Steamship Co.* v. *Joliffe*, 2 Wall. 450; *Ochiltree* v. *Railroad Co.*, 21 Wall. 249, 252-253; *Harrison* v. *Remington Paper Co.*, 140 Fed. 385, 390, *et seq.*; *Knickerbocker Trust Co.* v. *Myers*, 133 Fed. 764, 767."

and at page 448:

> "It is settled by decisions of this and other federal courts (*Ettor* v. *Tacoma*, and cases cited in connection therewith, *supra*) that, upon the facts

> here disclosed, a contractual obligation arose; and the right to enforce it, having become vested, comes within the protection of both the contract impairment clause in Art. 1, § 10, and the due process of law clause in the Fourteenth Amendment of the Federal Constitution."

Obviously, there was, in the absence of the constitutional provision, no liability of the director for the derelictions of the officer, but the constitution created such liability. So also in this case, if it can be said that there was no liability of the defendants prior to the Settlement Act for the return of the property, that Act created such liability. In the *Coombes* case, the Court held that the defendant therein was a director when the defalcation occurred and that the right of plaintiff existed under the constitution at that time and that the right was a vested right coming within the protection of the due process clause of the Constitution. So also in this case, the right of respondent to the return of 80% of the property existed under the Settlement Act when it filed its consent, pursuant to said Act, to the postponement of the payment of 20% thereof and the use thereof by the United States, and its right is a vested right coming within the protection of the due process clause of the Constitution.

"A law can be repealed by the lawgiver; but rights which have been acquired under it, while it was in force, do not thereby cease. It would be an act of absolute injustice to abolish with the law all the effects which it had produced. *Sutherland on Statutory Construction* ~~108.~~ Vol 2. (2nd Ed.) p. 1217.

IV.

Postponement of the return of property, like the postponement of the payment of a debt, constitutes a deprivation of property just as much as the taking of the property itself.

In *Louisiana* v. *New Orleans,* 102 U. S. 203, Justice Field said at page 207:

> "The Latin proverb, *qui cito dab bis dat,*—he who gives quickly gives twice,—has its counterpart in a maxim equally sound,—*qui serius solvit, minus solvit,*—he who pays too late, pays less."

If the United States Government, through Congress, has revested the title in the former owner, or directed the immediate return of the property and such return is thereafter postponed by the Act of Congress, such Act of Congress lessens the value of that property to the former owner, and if no compensation is given for such taking such postponement of the return of the property is just as much a deprivation of property as the taking of part of the property itself.

A vested right of action is property in the same sense in which tangible things are property, and is equally protected against arbitrary interference, and whether it springs from contract or from the principles of the common law, it is not competent for the legislature to take it away.

> *Pritchard* v. *Norton,* 106 U. S. 124;
> *Johnson* v. *Jones,* 44 Ill. 142.

A statute impairs the obligation of a contract if it prevents its enforcement, or tends to postpone or retard en-

forcement, or seriously interfere with the enforcement of the contract.

> *McGahey* v. *Virginia,* 135 U. S. 662;
> *Louisiana* v. *New Orleans,* 102 U. S. 203;
> *Seibert* v. *Lewis,* 122 U. S. 284;
> *South Carolina* v. *Gaillard,* 101 U. S. 437.

In the case of *People* v. *Hawkins,* 157 N. Y. 1 (51 N. E. 257) the Court said as follows (p. 7):

> "The citizen cannot be deprived of his property without due process of law. The principle embodied in this constitutional guaranty is not limited to the physical taking of property. Any law which annihilates its value, restricts its use, or takes away any of its essential attributes, comes within the purview of this limitation upon legislative power. The validity of all such laws is to be tested by the purpose of their enactment and the practical effect and operation that they may have upon property. A law which interferes with property by depriving the owner of the profitable and free use of it, or hampers him in the application of it for the purposes of trade or commerce, or imposes conditions upon the right to hold or sell it, may seriously impair its value, against which the Constitution is a protection."

Under the guise of a mere "postponement" of the return of this vested property, the Joint Resolution actually confiscates it. For it cannot be returned (except in the President's discretion), until Germany has paid its debt to the United States, which may never be. Such failure to pay, up to the present time, is either due to Germany's inability to pay, or to its unwillingness. There is nothing

to indicate that its ability to pay will increase in the future; or that, if it be unwillingness, its attitude will change. In either event, a withholding until the occurrence of something that may never happen, is outright confiscation with not even a provision for interest in the meantime. Under such circumstances the use of the word "postponement" is not even comportable with the policy of a government which throughout its history has disdained the exercise of the power of confiscation.

V.

Public Resolution 53, involving complete delegation of legislative powers by Congress to the President, falls directly within the condemnation in the cases of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, and *Schechter* v. *United States*, 295 U. S. 495.

In the case of *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, Chief Justice Hughes said (p. 415):

> "* * * Section 9 (c) does not state whether or in what circumstances or under what conditions the President is to prohibit the transportation of the amount of petroleum or petroleum products produced in excess of the state's permission. It establishes no criterion to govern the President's course. It does not require any finding by the President as a condition of his action. The Congress in section 9 (c) thus declares no policy as to the transportation of the excess production. So far as this section is concerned, it gives to the President an unlimited authority to determine the policy and to lay down the prohibition, or not to lay it down, as he may see fit.

> And disobedience to his order is made a crime punishable by fine and imprisonment."

and at page 421:

> "The Constitution provides that 'All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Article 1, § 1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into Execution' its general powers. Article 1, § 8, par. 18. The Congress manifestly is not permitted to abdicate or to transfer to others the essential legislative functions with which it is thus vested."

In the case of *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, 537-538, Chief Justice Hughes said:

> "* * * But Congress cannot delegate legislative power to the President to exercise an unfettered discretion to make whatever laws he thinks may be needed or advisable for the rehabilitation and expansion of trade or industry."

In Public Resolution 53 the President is given absolute discretion as to when the ban provided for by the Resolution should be lifted. No standards are set by Congress, and clearly the Resolution is an abdication of legislative power belonging to Congress.

The Annual Report of the Secretary of the Treasury on the State of the Finances for Fiscal Year Ended June 30, 1935 indicates that the restriction was removed as regarding a German national who received an award from the War Claims Arbiter. In said report the following is stated (p. 64):

"Fifty percent of the award in favor of the estate of a German national was paid during the fiscal year following removal by the President of the restrictions of Public Resolution No. 53, approved June 27, 1934, upon recommendation by the Secretary of the Treasury."*

VI.

If Public Resolution No. 53 be unconstitutional then respondent is entitled to the return of its property, and it is immaterial whether this action is regarded as an action against the United States or against the present holder of the property belonging to the respondent.

Our contention is that Public Resolution No. 53 is unconstitutional. If that act be unconstitutional respondent is entitled to the return of the property and respondent is entitled to bring suit under Section 9 of the Trading with the Enemy Act. The pertinent provisions of that section are set forth as Appendix A of this brief.

Therefore, it is immaterial whether or not this is a suit against the United States.

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*NOTE: On page 14 of the Government's brief (footnote) it is stated that the President has lifted the restriction by two executive orders mentioned in that note. No mention is made of the executive order by which the ban was lifted, as above stated, as to a German national. Therefore, the statement contained on page 14 is misleading.

The further statement that the restriction is limited by Congress itself to German nationals, is also misleading because there is no restriction imposed by Congress as to the President's power.

This unlimited restriction is in violation of the ruling contained in the cases referred to under this point.

VII.

Taking for granted that the Treaty of Berlin empowered Congress permanently to confiscate German property, Congress not having availed itself of that power, but having, subsequent to the Treaty of Berlin, passed the Settlement of War Claims Act, the Treaty of Berlin is immaterial.

It is contended by the petitioners that the Treaty of Berlin expressly reserved the privileges accorded to the allies under Article 297, Section IV, Part X of the Treaty of Versailles.

The pertinent provision of the Treaty of Berlin (November 14, 1921, U. S. Stat. L., Vol. 42, part 2, p. 1938) is as follows (Trading with the Enemy Act by Meares, p. 512):

"ARTICLE I.

"Germany undertakes to accord to the United States and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

"ARTICLE II.

"With a view to defining more particularly the obligations of Germany under the foregoing Article

with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

"(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV."

Paragraph 1 of the Annex to Article 297, Section IV, Part X, of the Treaty of Versailles contains the following provision:

"Every action taken with regard to any property, business, or company, whether as regards its investigation, sequestration, compulsory administration, use, requisition, supervision, or winding up, the sale or management of property, rights, or interest, the collection or discharge of debts, the payment of costs, charges, or expenses, or any other matter, whatsoever, in pursuance of orders, directions, decisions, or instructions of any court or of any department of the Government of any of the High Contracting Parties, made or given, or purporting to be made or given, in pursuance of war legislation with regard to enemy property, rights or interests, is confirmed."

A reading of these provisions indicates that any act performed by way of compulsory disposition of the property is thereby ratified. Therefore, any sale of the property in its original state is thereby ratified, and any permanent confiscation, if such had taken place, would have been ratified. But nowhere in any of the provisions cited is there any statement that the disposition made by Con-

gress after the enactment of this Treaty, namely, the return thereof, shall be deemed ineffectual.

Consequently these provisions of the Treaty of Berlin and the Treaty of Versailles are utterly immaterial. They might have authorized a permanent confiscation had Congress seen fit to do so, but Congress did not take advantage of the privilege of permanent confiscation which might have been undertaken as an exceptional war measure. Congress wisely did not adopt this policy.

In this connection, it is noted that, throughout their Brief, petitioners stress the rights of the United States under Article II of the Treaty of Berlin. Little or no reference is made by them to the facts that Article II of the Treaty purports to carry out Section 2 of the Peace Resolution of 1921 and that Section 5 of the Peace Resolution, which is made a part of the Treaty, *is the Section which specifically has to do with enemy property.* As was pointed out by the Committee of Finance of the Senate (Report 273—70th Congress—1st Session) Section 5 of the Peace Resolution, which is part of the Treaty, and provides that the United States will hold the property until Germany shall have made suitable provision for the satisfaction of claims, is inconsistent with the rights of the United States, under Article II of the Treaty, to liquidate the property and apply its proceeds to the payment of such claims. As the Committee pointed out (p. 13):

> "The only interpretation which will reconcile these provisions is that the United States specifically reserved the right to use the German property for the settlement of American claims *only if suitable provision were not made by the German Government for the settlement of American claims.*" (Italics ours.)

It seems clear that the construction given to the provisions by the Committee on Finance is the only logical and sensible construction which could be given to them. In the one section, the United States can confiscate the property; in the other it must make "no disposition" of it "until such time as the Imperial German Government * * * or their successor * * * shall have * * * made suitable provision for the satisfaction of all claims". The "suitable provision" was made and, when it was made, the United States, conformable with its treaty obligation, made "disposition" of the property by providing, in the Settlement of War Claims Act, for the immediate return of 80% thereof and the temporary retention of the remaining 20%. Granting, then, the power to confiscate under Article II, it must also be granted, and cannot logically be denied, that Congress, having determined that suitable provision had been made, provided, as it was by treaty bound to provide, for the return of the property to the owners.

VIII.

Respondent is not precluded by the Treaty of Berlin from questioning the validity of Public Resolution 53.

In their Point II (Brief, pp. 24-29), petitioners argue that the Treaty of Berlin precludes respondent from questioning the validity of Public Resolution 53.

It is here to be emphasized that we are not here dealing with a case where it is sought to invalidate or to avoid the legal and binding effect of sales or other dispositions by the Alien Property Custodian of alien property, as was the situation in the cases of *Klein* v. *Palmer,* 18 Fed. (2d), 932;

Munich Reinsurance Co. v. *First Reinsurance Co.*, 6 Fed. (2d) 742; *Lange* v. *Wingrave*, 295 Fed. 565 and *United States* v. *Chemical Foundation*, 272 U. S. 1, cited by petitioners. Nor do we question that the Treaty of Berlin effectively precluded recovery in those cases.

But we submit that the Treaty of Berlin does not either directly or impliedly destroy the fundamental proposition that the protection of the Fifth Amendment to the Constitution is afforded as much to a German as it is to a citizen of the United States.

That a citizen of Germany may not bring suit against the United States without its consent is a self-evident fact and that, when debarred from bringing such suit, he must seek redress through his government is equally self-evident. But where he is given the right to sue the United States, he most certainly may avail himself of such right, whether or not he might also pursue his claim through his own government.

The case of *United States* v. *Dickelman*, 92 U. S. 520, asserts no contrary principle. Petitioners' quotation therefrom is significant only in what it omits. The suit was brought in the Court of Claims under a jurisdictional act "for its decision in accordance with law". This Court pointed out that the law involved was a Treaty with Prussia. After pointing out that the usual procedure in the matter of a claim of a foreign citizen against the United States, is through his own government, this Court stated that the claimant had so presented his claim and that (p. 524):

> "* * * Subsequently, Congress, by joint resolution, referred the matter to the Court of Claim *'for its decision according to law'. The Courts of the United*

> *States were thus opened to Dickelman for this proceeding.* In this way the United States have submitted to the Court of Claims, and through that court upon appeal to us, the determination of the question of their legal liability under all the circumstances of this case for the payment of damages to a citizen of Prussia upon a claim originally presented by his sovereign in his behalf." (Italics ours.)

And the Court proceeded to consider his right, not to bring the suit, but to the damages claimed, on the law as found in "the treaty between the two governments, as well as under the general law of nations".

As we pointed out hereinbefore, respondent has the right to bring this suit under the provisions of Section 9 of the Act and there is nothing in Public Resolution 53 which takes away that right. It certainly would not seriously be urged that, by the Treaty of Berlin, the United States would enjoy the right to reseize the property which it has already disposed of to the owners thereof. If respondent has, as we contend, obtained a vested interest in the property here claimed, and if his right to sue under the laws of the United States still exists, as we contend, then it is clear that the provisions of the Treaty of Berlin, upon which petitioners rely, in no way affect such rights. In fine, respondent, by the Settlement of War Claims Act of 1928, was given the right to the return of his property under the provisions and conditions thereof; it complied with such conditions and, in doing so, it obtained a vested right in its property; it was given by said Act the right to pursue its claim in our courts; its vested right cannot, under our Constitution, be destroyed; and the United States can no more deprive it of such vested rights by resort to the Treaty of Berlin than it could, by similar resort, resieze property which it has al-

ready disposed of to owners under the Settlement of War Claims Act.

In this connection, it is noted that petitioners state at page 28 of their Brief that they have been advised:

> "by the Secretary of State that the German Government has made no claim that the Resolution is in conflict with these treaties. Nor has the German Government suggested that the Treaty of Berlin does not contain plenary authority for such action by the United States. This construction of the treaty by the political departments of the parties to it indicates that this Resolution cannot be considered as inconsistent with it."

There is nothing before the Court corroborating this statement. In fact, we have been informed that the German Government did protest orally and in writing against Public Resolution No. 53.

However, it does not follow that if the German Government has made no protest that it approves the action of Congress or of the respondent acting under the Act of Congress, and we challenge petitioners to demonstrate any affirmative statement by the German Government that makes any claim that the Resolution is not in conflict with this Treaty and that it agrees that the Treaty of Berlin contains any authority for Public Resolution No. 53.

There is no basis for the contention on the part of the Government that the Treaty of Berlin has been construed by the political departments in such fashion as claimed here.

Certainly, the respondent is bound by the Treaty of its sovereign, but the Treaty which binds it is the present

Treaty,* as fortified by our Constitution, which accords to alien friends rights and privileges of Amendment 5 of the Constitution.

See *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481 (51 S. Ct. 229), where it was held that a Russian corporation, being an alien friend, even before recognition of Russia, was entitled to the protection of the Fifth Amendment of the Federal Constitution.

On page 46 of the Petitioners' brief it is stated that the respondent cannot complain because the German Government has obligated itself to pay it the "just compensation" which the respondent asserts is demanded by the Fifth Amendment, and the Petitioners quote paragraph (i) of Article 297 of Section IV, Part X of the Treaty of Berlin, providing that

> "Germany undertakes to compensate her nationals in respect of the sale or retention of their property, rights or interest in Allied or Associated States."

With regard to this undertaking, Charles C. Hyde, formerly Solicitor of the Department of State, has written as follows:

> "Inasmuch, however, as the actual value of that undertaking was necessarily slight by reason of the fiscal burden imposed upon the German territorial sovereign, the agreement signified consent

*NOTE: The Treaty between the United States and Germany (44 Stat. (Part 3) 2132) contains the following:

"The nationals of each High Contracting Party shall receive within the territories of the other, upon submitting to conditions imposed upon its nationals, the most constant protection and security for their persons and property, and shall enjoy in this respect that degree of protection that is required by international law. Their property shall not be taken without due process of law and without payment of just compensation."

> to what amounted to a practical confiscation of private property by its enemies." (International Law, vol. 2, pp. 240-241.)

Furthermore, it seems to be contended by the Petitioners that the Treaty of Berlin can be interpreted as depriving German nationals of property, the beneficial interest in which is already vested in them. That contention of the Petitioners seem to be contrary to the statement of this Court, oft quoted, made in *The Cherokee Tobacco*, 11 Wall. 616, 620:

> "It need hardly be said that a treaty cannot change the Constitution or be held valid if it be in violation of that instrument."

To the same effect, see: 2 Hyde International Law, page 9, where the following is stated:

> "An independent State is deemed to possess the broadest right to enter into international agreements. Its constitution may, however, in various ways limit and regulate the exercise of the right, restricting the conclusion of treaties designed to effect certain objects, or prescribing the method by which the State shall give its consent to certain classes of engagements. An unconstitutional treaty must be regarded as void."

This statement of the author is fortified by the following note:

> "'Indeed a treaty which undertook to take away what the Constitution secured or to enlarge the Federal jurisdiction would simply be void.' Fuller, *C.J.*, in *Downes* v. *Bidwell*, 182 U. S. 244, 370. 'It need hardly be said that a treaty cannot change the

Constitution or be held valid if it be in violation of that instrument.' Swayne, *J.*, in *The Cherokee Tobacco,* 11 Wall. 616, 620."

IX.

The rights acquired by respondent, being vested rights, were not limited or destroyed by any provisions in treaties or agreements between the United States and Germany.

At pages 41 *et seq.* of their Brief, petitioners argue that Congress had the right to invalidate any contractual right gained by respondent because such right of Congress "was reserved by Congress in legislation—including treaties or agreements binding upon respondent—at the time the alleged contract was made".

Here again petitioners allude to the Treaty of Berlin in which there is incorporated the provision of the Treaty of Versailles in which the United States reserves the power to take measures with regard to enemy property "which have had or will have the effect of removing from the proprietors the power of disposition over their property". It should be borne in mind that the Treaty of Versailles was negotiated in 1919, and was never ratified by the United States and that the Treaty of Berlin became effective November 14, 1921.

A measure subsequently taken with respect to enemy property was that of the Settlement of War Claims Act of March 10, 1928, whereby Congress ordained that all of the property should eventually be returned to the German owners and that 80% of it should be immediately returned upon the agreement of the owner that the remaining 20% could be held and used by the United States.

And while that Act was in force and millions in property were being returned thereunder to the owners, Germany and the United States entered into the Debt-Funding Agreement of June 23, 1930. And the United States there agreed to accept the full faith and credit of Germany "as the only security and guaranty" for the fulfillment of Germany's obligations to the United States and its nationals; that the evidence of such indebtedness should be the bonds of Germany which this country has accepted and has never returned; that Germany should occupy the same position as to its debts as do the other sovereign debtors of the United States occupy as to their debts; and that the United States was bound to release property which Congress had theretofore authorized to be released.

Now, in 1936, we are told that we must go back to the Treaty of Berlin of 1921 and must ignore the Settlement of War Claims Act of 1928 and the Debt-Funding Agreement of 1930 and we must do so because Congress desires to hold the paltry 5% of German property still in the hands of petitioners as a club to compel defaulted payments under the Debt-Funding Agreement. We must ignore the fact that the United States agreed "to accept the full faith and credit of Germany as the only security"; we must ignore the fact that the United States agreed that "Germany will be in the same position" as the other sovereign debtors of the United States; we must ignore the fact that the United States agreed to release German property which it held and which Congress had, prior to the debt-funding agreement of 1930 and by the Settlement of War Claims Act of 1928, authorized to be released to the German owners. If, as petitioners argue, we are to read into respondent's contract the "legislation including treaties or agreements * * * ", why

read only the Treaty of Berlin and Public Resolution 53; why omit the Settlement of War Claims Act and the Debt-Funding Agreement of 1930? The answer is clear, namely, that the inclusion of the provisions of the Settlement of War Claims Act and of the Debt-Funding Agreement with those of Public Resolution 53 does not make a picture which portrays the spirit, and the honor of this country.

We have hereinbefore emphasized that the whole history of the legislation, the whole framework of the Act, and the whole course of conduct of this Government thereunder, prior to Public Resolution 53, was that of sequestration, not of confiscation; that of holding in trust for the owners, not that of ultimate deprivation; that of recognition of an ultimate right of return, not that of a denial of such ultimate right; that of return, not that of holding it as a club to compel payment of reparations and awards by Germany; that of a recognition of the principle, as stated by this Court in *Russian Volunteer Fleet* v. *United States*, 282 U. S. 481, 491-2, that the standards of our Government are "not dependent upon the standards of other governments".

Of one thing we may be certain, namely, that Congress recognized in 1930 that a measure which, under the Treaty of Berlin of 1921, it was not required to take, it had effectively and irrevocably taken in 1928 when it ordained the return of property to the German owners because in the Debt-Funding Agreement of 1930, which was executed by the express authority of Congress (Act of June 5, 1930—Pub. No. 307—71st Congress), it agreed that the United States was thereby required to release property which it had already authorized to be released.

More than certain is it that Congress intended to provide and did provide, in the Settlement of War Claims Act

of 1928, for the return of all the property; that it intended to and did authorize the immediate payment of 80% thereof; that it intended to and did temporarily withhold the remaining 20% only upon the agreement of the owner to such retention; that it intended to and did effectively provide that the agreement of the United States to pay and deliver the 80% in consideration of the agreement of the owner to the retention of the 20% should constitute a contract between the United States and the owner; and that Congress recognized, as must all recognize, that the contract so made gave to the owner a vested right in property of which he could not constitutionally be deprived by any subsequent legislation of Congress.

Cases cited by petitioners to the point that a treaty may be superseded by a law of Congress are not in point. In none of them was there involved the question of the inviolability of a vested right in property. In the cases of *Whitney* v. *Robertson,* 124 U. S. 190 and the *Head Money Cases,* 112 U. S. 580, there was involved the right of the United States to exact duties under laws of Congress which were said to be in conflict with treaties. In the case of *Chae Chan Ping* v. *United States,* 130 U. S. 581, the plaintiff claimed the right to reenter this country under a treaty with China and notwithstanding his debarrment under a subsequent Act of Congress. The case is appropriate, however, on the proposition that the vested rights of foreigners in property are protected by the Fifth Amendment to the Constitution. At page 609, this Court stated:

> "* * * The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them,

are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character." (Italics ours.)

CONCLUSION

Wherefore, we respectfully submit that the decision below should be affirmed.

THOMAS H. CREIGHTON, JR.,
OTTO C. SOMMERICH,
JAMES J. LENIHAN,
Attorneys.

APPENDIX A

Trading with the Enemy Act of October 6, 1917 (c. 106, 40 Stat. 411) as Amended by the Settlement of War Claims Act of March 10, 1928 (c. 167, 45 Stat. 254) and by other Acts (U. S. C., Title 50, Appendix).

"9(b) In respect of all money or other property conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder and held by him or by the Treasurer of the United States, if the President shall determine that the owner thereof at the time such money or other property was required to be so conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or at the time when it was voluntarily delivered to him or was seized by him was—

* * *

"9(b)(13) A partnership, association, or other unincorporated body of individuals, having its principal place of business at such time within any country other than Austria, Hungary, or Austria-Hungary, or a corporation organized or incorporated within any country other than Austria, Hungary, or Austria-Hungary, and that the written consent provided for in subsection (m) has been filed,

* * *

"Then the President, *without any application being made therefor,* may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States, or of the interest therein to which the President shall determine such person entitled, either to the said owner or to the person by whom said property was conveyed, transferred, assigned, delivered, or paid

over to the Alien Property Custodian; * * *." (Italics ours.)

* * *

"9(m) No money or other property shall be returned under paragraph (12), (13), (14), or (16) of subsection (b) or under subsection (g) or (n) or (to the extent therein provided) under subsection (p), unless the person entitled thereto files a written consent to a postponement of the return of an amount equal to 20 per centum of the aggregate value of such money or other property (at the time, as nearly as may be, of the return), as determined by the Alien Property Custodian, and the investment of such amount in accordance with the provisions of section 25.* Such amount shall be deducted from the money to be returned to such person, so far as possible, and the balance shall be deducted from the proceeds of the sale of so much of the property as may be necessary, unless such person pays the balance to the Alien Property Custodian, except that no property shall be so sold prior to the expiration of six years from the date of the enactment of the Settlement of War Claims Act of 1928 (Act March 10, 1928, c. 167) without the consent of the person entitled thereto. The amounts so deducted shall be returned to the persons entitled thereto as provided in subsection (f) of section 25. The sale of any such property shall be made in accordance with the provisions of section 12, except that the provisions of such section relating to sales or resales to, or for the benefit of, citizens of the United States shall not be applicable. If such aggregate value of the money or other property to be returned under paragraph

*Section 25 provides for the investment out of the funds held by the Alien Property Custodian by the Treasurer of the United States in one or more participating certificates issued by the Secretary of the Treasury in accordance with the provisions of that section.

(12), (13), (14), or (16) of subsection (b) or under subsection (g) is less than $2,000, then the written consent shall not be required and the money or other property shall be returned in full without the temporary retention and investment of 20 per centum thereof."

* * *

"9(c) Any person whose money or other property the President is authorized to return under the provisions of subsection (b) hereof may file notice of claim for the return of such money or other property, as provided in subsection (a) hereof, and thereafter may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. * * *"

* * *

"9(a) Any person not an enemy or ally of enemy claiming any interest, right, or title in any money or other property which may have been conveyed, transferred, assigned, delivered, or paid to the Alien Property Custodian or seized by him hereunder * * * may file with the said custodian a notice of his claim under oath and in such form and containing such particulars as the said custodian shall require; and the President, if application is made therefor by the claimant, may order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States, * * *. If the President shall not so order within sixty days after the filing of such application or if the claimant shall have filed the notice as above required * * * said claimant may institute a suit in equity in the Supreme Court of the District of Columbia * * * to establish the interest, right, title * * * so claimed, and if so established

the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States * * *." (Italics ours.)

"12. All moneys (including checks and drafts payable on demand) paid to or received by the alien property custodian pursuant to this Act shall be deposited forthwith in the Treasury of the United States, and may be invested and reinvested by the Secretary of the Treasury in United States bonds or United States certificates of indebtedness, under such rules and regulations as the President shall prescribe for such deposit, investment, and sale of securities; and as soon after the end of the war as the President shall deem practicable, such securities shall be sold and the proceeds deposited in the Treasury.

"All other property of an enemy, or ally of enemy, conveyed, transferred, assigned, delivered, or paid to the alien property custodian hereunder shall be safely held and administered by him except as hereinafter provided; and the President is authorized to designate as a depositary, or depositaries, of property of an enemy or ally of enemy, any bank, or banks, or trust company, or trust companies, or other suitable depositary or depositaries, located and doing business in the United States. The alien property custodian may deposit with such designated depositary or depositaries, or with the Secretary of the Treasury, any stocks, bonds, notes, time drafts, time bills of exchange, or other securities, or property (except money or checks or drafts payable on demand which are required to be deposited with the Secretary of the Treasury) and such depositary or depositaries shall be authorized and empowered to collect any dividends or interest or

income that may become due and any maturing obligations held for the account of such custodian. Any moneys collected on said account shall be paid and deposited forthwith by said depositary or by the alien property custodian into the Treasury of the United States as hereinbefore provided.

"The President shall require all such designated depositaries to execute and file bonds sufficient in his judgment to protect property on deposit, such bonds to be conditioned as he may direct.

"The alien property custodian shall be vested with all of the powers of a common-law trustee in respect of all property, other than money, which has been or shall be, or which has been or shall be required to be, conveyed, transferred, assigned, delivered, or paid over to him in pursuance of the provisions of this Act, and, in addition thereto, acting under the supervision and direction of the President, and under such rules and regulations as the President shall prescribe, shall have power to manage such property and do any act or things in respect thereof or make any disposition thereof or of any part thereof, by sale or otherwise, and exercise any rights or powers which may be or become appurtenant thereto or to the ownership thereof in like manner as though he were the absolute owner thereof: *Provided,* That any property sold under this Act, except when sold to the United States, shall be sold only to American citizens, at public sale to the highest bidder, after public advertisement of time and place of sale which shall be where the property or a major portion thereof is situated, unless the President stating the reasons therefor, in the public interest shall otherwise determine: *Provided further,* That when sold at public sale, the alien property custodian upon the order of the President stating the reasons therefor, shall have the right to reject all bids and resell such

property at public sale or otherwise as the President may direct. Any person purchasing property from the alien property custodian for an undisclosed principal, or for resale to a person not a citizen of the United States, or for the benefit of a person not a citizen of the United States, shall be guilty of a misdemeanor, and, upon conviction, shall be subject to a fine of not more than $10,000, or imprisonment for not more than ten years, or both, and the property shall be forfeited to the United States. It shall be the duty of every corporation incorporated within the United States and every unincorporated association, or company, or trustee, or trustees within the United States issuing shares or certificates representing beneficial interests to transfer such shares or certificates upon its, his, or their books into the name of the alien property custodian upon demand, accompanied by the presentation of the certificates which represent such shares or beneficial interests. The alien property custodian shall forthwith deposit in the Treasury of the United States, as hereinbefore provided, the proceeds of any such property or rights so sold by him.

"Any money or property required or authorized by the provisions of this Act to be paid, conveyed, transferred, assigned, or delivered to the alien property custodian shall, if said custodian shall so direct by written order, be paid, conveyed, transferred, assigned, or delivered to the Treasurer of the United States with the same effect as if to the alien property custodian.

"After the end of the war any claim of any enemy or of an ally of enemy to any money or other property received and held by the alien property custodian or deposited in the United States Treasury, shall be settled as Congress shall direct: *Provided, however,* That on order of the President as set forth in section nine hereof, or of the court, as

set forth in sections nine and ten hereof, the alien property custodion or the Treasurer of the United States, as the case may be, shall forthwith convey, transfer, assign, and pay to the person to whom the President shall so order, or in whose behalf the court shall enter final judgment or decree, any property of an enemy or ally of enemy held by said custodian or by said Treasurer, so far as may be necessary to comply with said order of the President or said final judgment or decree of the court: *And provided further,* That the Treasurer of the United States, on order of the alien property custodian, shall, as provided in section ten hereof, repay to the licensee any funds deposited by said licensee. (Oct. 6, 1917, c. 106, § 12, 40 Stat. 423; Mar. 28, 1918, c. 28, § 1, 40 Stat. 460.)"

* * *

"17. The district courts of the United States are hereby given jurisdiction to make and enter all such rules as to notice and otherwise, and all such orders and decrees, and to issue such process as may be necessary and proper in the premises to enforce the provisions of this Act, with a right of appeal from the final order or decree of such court as provided in sections one hundred and twenty-eight and two hundred and thirty-eight of the Act of March third, nineteen hundred and eleven, entitled 'An Act to codify, revise, and amend the laws relating to the judiciary.' (Oct. 6, 1917, c. 106, § 17, 40 Stat. 425.)"

APPENDIX B

PUBLIC RESOLUTION 53, APPROVED JUNE 27, 1934
(c. 851, 48 STAT. 1267)

To Amend the Settlement of War Claims Act of 1928, As Amended

Whereas the joint resolution of the Congress of the United States, approved July 2, 1921, provides in part as follows:

> "SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, * * * shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said [Government] * * *, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents * * * since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, * * *, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise * * *."

Whereas the treaty between the United States and Germany of August 25, 1921, incorporated said provision of such joint resolution and also provided in article I thereof as follows:

> "Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations, or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States."; and

Whereas by the agreement of August 10, 1922, between Germany and the United States, a Mixed Claims Commission was established to adjudicate claims of American nationals against Germany arising out of the World War; and

Whereas under the terms of the debt-funding agreement between Germany and the United States dated June 23, 1930, Germany agreed to pay to the United States in satisfaction of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichmarks for the period September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichmarks per annum from April 1, 1930, to March 31, 1981; and

Whereas Germany is now in arrears in payments due under said debt-funding agreement between Germany and the United States, and has, accordingly, failed to make suitable provision for the satisfaction of the said claims against Germany: Now, therefore be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That so long as Germany is in arrears in any payments of principal or interest, including interest at the rate of 5 per centum per annum on principal installments not paid when due, under the debt-funding agreement between Germany and the United States, dated June 23, 1930, with respect to Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, all payments, conveyances, transfers, or deliveries of money or property or the income, issues, profits, and/or avails thereof authorized or directed to be made under the Trading with the Enemy Act, as amended, or the Settlement of War Claims Act of 1928, as amended, whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved: *Provided, however,* That such of the funds as are from time to time available (without taking into consideration interest thereafter accruing) under the Settlement of War Claims Act of 1928, as amended, for the payment of principal and interest upon awards of said Mixed Claims Commission shall be applied when available to the payment of principal and interest upon such awards in the same manner and to the same extent as though certain of the payments provided for in said Act had not been postponed under this

resolution: *Provided further,* That the President may, in his sole discretion, remove the restriction as to any of the cases or classes of cases in relation to which payments, conveyances, transfers, or deliveries have been postponed under this resolution: *And provided further,* That the President is authorized to determine, for the purposes of this resolution, the period or periods in which Germany is in arrears in the payments hereinbefore described, and his determination thereof shall not be subject to judicial review.

Section 36 of the Emergency Farm Mortgage Act of 1933, as amended, is amended—

I. By striking the comma and the word "and" after the words "to reduce and refinance its outstanding indebtedness incurred in connection with any such project" in the second sentence thereof and inserting in place thereof the following: "; or, whether or not it has any such indebtedness, to purchase or otherwise acquire in connection with such project storage reservoirs or dams or sites therefor, or additional water rights, or canals, ditches, or rights-of-way for the conduct of water, or other works or appurtenances necessary for the delivery of water, provided such purchase or acquisition is not intended to bring additional lands into production. Such loans".

II. By adding at the beginning of (5) thereof the following: "in the case of a loan to reduce or refinance its outstanding indebtedness,".

III. By adding at the beginning of (C) thereof the following: "in the case of a loan to reduce or refinance the outstanding indebtednes of an applicant,".

Approved, June 27, 1934.

APPENDIX C

Debt Funding Agreement of 1930

(Reprinted in Annual Report of the Secretary of the Treasury for the year ended June 30, 1930, pp. 341-347)

Agreement made the 23d Day of June, 1930, at the City of Washington, District of Columbia, between the Government of the German Reich, hereinafter called Germany, party of the first part, and the Government of the United States of America, hereinafter called the United States, party of the second part.

Whereas Germany is obligated under the provisions of the armistice convention signed November 11, 1918, and of the treaty signed at Berlin, August 25, 1921, to pay to the United States the awards, and interest thereon, entered and to be entered in favor of the United States Government and its nationals by the Mixed Claims Commission, United States and Germany, established in pursuance of the agreement of August 10, 1922; and

Whereas the United States is also entitled to be reimbursed for the costs of its army of occupation; and

Whereas Germany having made and the United States having received payments in part satisfaction on account of these two obligations desire to make arrangements for the complete and final discharge of said obligations;

Now, therefore, in consideration of the premises and the mutual covenants herein contained, it is agreed as follows:

1. *Amounts to be paid.*—(a) Germany shall pay and the United States shall accept in full satisfaction of all of Germany's obligations remaining on account of awards, including interest thereon, entered and to be entered by the Mixed Claims Commission, United States and Germany, the sum of 40,800,000 reichsmarks for the period of September 1, 1929, to March 31, 1930, and the sum of 40,800,000 reichsmarks per annum from April 1, 1930, to March 31, 1981. As evidence of this indebtedness, Germany shall issue to the United States at par, as of September 1, 1929, bonds of Germany, the first of which shall be in the principal amount of 40,800,000 reichsmarks, dated September 1, 1929, and maturing March 31, 1930, and each of the others of which shall be in the principal amount of 20,400,000 reichsmarks, dated September 1, 1929, and maturing serially on September 30, 1930, and on each succeeding March 31 and September 30 up to and including March 31, 1981. The obligations of Germany hereinabove set forth in this paragraph shall cease as soon as all of the payments contemplated by the settlement of war claims act of 1928 have been completed and the bonds not then matured evidencing such obligations shall be canceled and returned to Germany.

(b) Germany shall pay and the United States shall accept in full reimbursement of the amounts remaining due on account of the costs of the United States army of occupation, the amounts set forth on the several dates fixed in the following schedule:

March 31:	*Reichsmark*	September 30:	*Reichsmark*
1930	25,100,000	1930	12,750,000
1931	12,750,000	1931	12,650,000
1932	12,650,000	1932	12,650,000
1933	12,650,000	1933	9,300,000
1934	9,300,000	1934	9,300,000
1935	9,300,000	1935	9,300,000
1936	9,300,000	1936	9,300,000
1937	9,300,000	1937	8,200,000
1938	8,200,000	1938	8,200,000
1939	8,200,000	1939	9,300,000
1940	9,300,000	1940	9,300,000
1941	9,300,000	1941	12,650,000
1942	12,650,000	1942	12,650,000
1943	12,650,000	1943	12,650,000
1944	12,650,000	1944	12,650,000
1945	12,650,000	1945	12,650,000
1946	12,650,000	1946	12,650,000
1947	12,650,000	1947	12,650,000
1948	12,650,000	1948	12,650,000
1949	12,650,000	1949	17,650,000
1950	17,650,000	1950	17,650,000
1951	17,650,000	1951	17,650,000
1952	17,650,000	1952	17,650,000
1953	17,650,000	1953	17,650,000
1954	17,650,000	1954	17,650,000
1955	17,650,000	1955	17,650,000
1956	17,650,000	1956	17,650,000
1957	17,650,000	1957	17,650,000
1958	17,650,000	1958	17,650,000
1959	17,650,000	1959	17,650,000
1960	17,650,000	1960	17,650,000
1961	17,650,000	1961	17,650,000
1962	17,650,000	1962	17,650,000
1963	17,650,000	1963	17,650,000
1964	17,650,000	1964	17,650,000
1965	17,650,000	1965	17,650,000
1966	17,650,000		

As evidence of this indebtedness, Germany shall issue to the United States at par, as of September 1, 1929, bonds of Germany, dated September 1, 1929, and maturing on March 31, 1930, and on each succeeding September 30 and March 31 in the amounts and on the several dates fixed in the preceding schedule.

2. *Form of bonds.*—All bonds issued hereunder to the United States shall be payable to the Government of the United States of America and shall be signed for Germany by the Reichsschuldenverwaltung. The bonds issued for the amounts to be paid under paragraph No. 1 (a) of this agreement shall be issued in 103 pieces with maturities and in denominations corresponding to the payments therein set forth and shall be substantially in the form set forth in Exhibit A hereto annexed and shall bear no interest, unless payment thereof is postponed pursuant to paragraph No. 5 of this agreement. The bonds issued for the amounts to be paid under paragraph No. 1 (b) of this agreement shall be issued in 73 pieces with maturities and in denominations corresponding to the payments therein set forth and shall be substantially in the form set forth in Exhibit B hereto annexed and shall bear no interest unless payment thereof is postponed pursuant to paragraph No. 5 of this agreement.

3. *Method of payment.*—All bonds issued hereunder shall be payable both principal and interest, if any, at the Federal Reserve Bank of New York for credit in the general account of the Treasurer of the United States in funds immediately available on the date when payment is due in United States gold coin in an amount in dollars equivalent to the amount due in reichsmarks, at the average of the middle rates prevailing on the Berlin Bourse, during the half monthly period preceding the date of payment. Germany undertakes to have the Reichsbank certify to the Federal Reserve Bank of New York on the date of payment the rate of exchange at which the transfer shall be made. Germany undertakes for the purposes of this agreement that the reichsmark shall have and shall retain its

convertibility into gold or devisen as contemplated in section 31 of the present Reichsbank law and that for these purposes the reichsmark shall have and shall retain a mint parity of 1/2790 kilogram of fine gold as defined in the German coinage law of August 30, 1924.

4. *Security.*—The United States hereby agrees to accept the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations hereunder.

5. *Postponement of payment.*—Germany, at its option, upon not less than 90 days' advance notice in writing to the United States, may postpone any payment on account of principal falling due as hereinabove provided, to any subsequent September 30 or March 31 not more than two and one-half years distant from its due date, but only on condition that in case Germany shall at any time exercise this option as to any payment of principal, the two payments falling due in the next succeeding twelve months can not be postponed to any date more than two years distant from the date when the first payment therein becomes due unless and until the payments previously postponed shall actually have been made, and the two payments falling due in the second succeeding twelve months can not be postponed to any date more than one year distant from the date when the first payment therein becomes due unless and until the payments previously postponed shall actually have been made, and further payments can not be postponed at all unless and until all payments of principal previously postponed shall actually have been made. All payments provided for under paragraph No. 1 (a) of this agreement so postponed shall bear interest at the rate of 5 per cent per annum, payable semiannually, and all payments provided

for under paragraph No. 1 (b) of this agreement so postponed shall bear interest at the rate of 3⅝ per cent per annum, payable semi-annually.

6. *Payments before maturity.*—Upon not less than 90 days' advance notice in writing to the United States and the approval of the Secretary of the Treasury of the United States, Germany may, on March 31 or September 30 of any year, make advance payments on account of any bonds issued under this agreement and held by the United States. Any such advance payments shall be applied to the principal of such bonds as may be indicated by Germany at the time of the payment.

7. *Exemption from taxation.*—The principal and interest, if any, of all bonds issued hereunder shall be paid without deduction for, and shall be exempt from, any and all taxes or other public dues, present or future, imposed by or under authority of Germany or any political or local taxing authority within Germany.

8. *Notices.*—Any notice from or by Germany shall be sufficient if delivered to the American Embassy at Berlin or to the Secretary of the Treasury at the Treasury of the United States in Washington. Any notice, request, or consent under the hand of the Secretary of the Treasury of the United States shall be deemed and taken as the notice, request, or consent of the United States and shall be sufficient if delivered at the German Embassy at Washington or at the office of the German Ministry of Finance at Berlin. The United States in its discretion may waive any notice required hereunder, but any such waiver shall be in writing and shall not extend to or affect any subsequent notice or impair any right of the United States to require notice hereunder.

9. *Compliance with legal requirements.*—Germany and the United States, each for itself, represents and agrees that the execution and delivery of this agreement have in all respects been duly authorized, and that all acts, conditions, and legal formalities which should have been completed prior to the making of this agreement have been completed as required by the laws of Germany and of the United States respectively and in conformity therewith.

10. *Counterparts.*—This agreement shall be executed in two counterparts, each of which shall be in the English and German languages, both texts having equal force and each counterpart having the force and effect of an original.

In witness whereof, Germany has caused this agreement to be executed on its behalf by its ambassador extraordinary and plenipotentiary at Washington thereunto duly authorized, and the United States has likewise caused this agreement to be executed on its behalf by the Secretary of the Treasury, with the approval of the President, pursuant to the act of Congress approved June 5, 1930, all on the day and year first above written.

THE GERMAN REICH,

By F. VON PRITTWITZ UND GAFFRON,
Ambassador Extraordinary and Plenipotentiary.

THE UNITED STATES OF AMERICA,

By A. W. MELLON,
Secretary of the Treasury.

Approved.
HERBERT HOOVER,
President.

NOTES EXCHANGED BETWEEN GERMANY AND THE UNITED STATES SIMULTANEOUSLY WITH THE EXECUTION OF THE AGREEMENT FOR THE COMPLETE AND FINAL DISCHARGE OF THE OBLIGATIONS OF GERMANY TO THE UNITED STATES WITH RESPECT TO THE AWARDS MADE BY THE MIXED CLAIMS COMMISSION, UNITED STATES AND GERMANY, AND FOR THE COSTS OF THIS GOVERNMENT'S ARMY OF OCCUPATION

The German Government (the Government of the United States) has the honor to set forth its understanding of paragraph No. 4 of the agreement executed this day between the United States and Germany in the following sense:

(a) In respect of the acceptance by the United States of the full faith and credit of Germany as the only security and guaranty for the fulfillment of Germany's obligations under the agreement, Germany will be in the same position as the principal debtors of the United States under the debt funding agreements which exist between them and the United States.

(b) Nothing contained therein shall be construed as requiring the United States to release any German property which it now holds other than as heretofore or hereafter authorized by the Congress of the United States.

The German Government (the Government of the United States) also desires to expressly recognize, so far as the agreement executed this day between the United States and Germany is concerned, the prior rights of the holders of the bonds of the German external loan as provided in the general bond securing the loan dated October 10, 1924.

Bonds No. 1 in the amounts of R. M. 40,800,000 and R. M. 25,100,000 to be delivered under paragraphs Nos. 1 (a) and 1 (b) respectively of the agreement executed this

day between the United States and Germany have been paid in full and when the bonds to be delivered by Germany under this agreement are received by the United States, bonds No. 1 will be canceled and marked "paid" and returned to the German ambassador at Washington for delivery to the German Government.

The United States has received the sum of R. M. 6,800,000 and the sum of R. M. 4,250,000 on account of the bonds No. 2 to be delivered under paragraphs Nos. 1 (a) and 1 (b) respectively of the agreement executed this day between the United States and Germany. The receipt of these amounts will be evidenced by an indorsement by the United States on the bonds on account of which the sums were received.

The agreement executed this day between the United States and Germany is substituted for the direct arrangement providing for the realization by the United States of its 2¼ per cent share in German payments under the experts' plan of 1924.

APPENDIX D

PUBLIC RESOLUTION NO. 8 (PEACE RESOLUTION), APPROVED JULY 2, 1921 (C. 40, 42 STAT. 105)

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

SEC. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 3. That the state of war declared to exist between the Imperial and Royal Austro-Hungarian Government and the United States of America by the joint resolution of Congress approved December 7, 1917, is hereby declared at an end.

SEC. 4. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privlieges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 3, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Saint Germain-en-Laye or the treaty of Trianon, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever and all property of the Imperial and Royal Austro-Hungarian Government or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no

disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments, respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America.

SEC. 6. Nothing herein contained shall be construed to repeal, modify or amend the provisions of the joint resolution "declaring that certain Acts of Congress, joint resolutions and proclamations shall be construed as if the war had ended and the present or existing emergency expired," approved March 3, 1921, or the passport control provisions of an Act entitled "An act making appropriations for the diplomatic and consudar service for the fiscal year ending June 30, 1922," approved March 2, 1921; nor to be effective to terminate the military status of any person now in desertion from the military or naval service of the United States, nor to terminate the liability to prosecution and punishment under the Selective Service law, approved May 18, 1917, of any person who failed to comply with the provisions of said Act or of Acts amendatory thereof.

Approved July 2, 1921.

APPENDIX E

AGREEMENT OF AUGUST 10, 1922, BETWEEN THE UNITED STATES AND GERMANY FOR A MIXED CLAIMS COMMISSION (42 STAT. 2200)

AGREEMENT

The United States of America and Germany,

being desirous of determining the amount to be paid by Germany in satisfaction of Germany's financial obligations under the Treaty concluded by the two Governments on August 25, 1921, which secures to the United States and its nationals rights specified under a resolution of the Congress of the United States of July 2, 1921, including rights under the Treaty of Versailles, have resolved to submit the questions for decision to a mixed commission and have appointed as their plenipotentiaries for the purpose of concluding the following agreement:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

Alanson B. Houghton, Ambassador Extraordinary and Plenipotentiary of the United States of America to Germany,

and

THE PRESIDENT OF THE GERMAN EMPIRE

Dr. Wirth, Chancellor of the German Empire,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

The commission shall pass upon the following categories of claims which are more particularly defined in the Treaty of August 25, 1921, and in the Treaty of Versailles:

(1) Claims of American citizens, arising since July 31, 1914, in respect of damage to, or seizure of, their property, rights and interests, including any company or association in which they are interested, within German territory as it existed on August 1, 1914;

(2) Other claims for loss or damage to which the United States or its nationals have been subjected with respect to injuries to persons, or to property, rights and interests, including any company or association in which American nationals are interested, since July 31, 1914, as a consequence of the war;

(3) Debts owing to American citizens by the German Government or by German nationals.

ARTICLE II

The Government of the United States and the Government of Germany shall each appoint one commissioner. The two Governments shall by agreement select an umpire to decide upon any cases concerning which the commissioners may disagree, or upon any points of difference that may arise in the course of their proceedings. Should the umpire or any of the commissioners die or retire, or be unable for any reason to discharge his functions, the same procedure shall be followed for filling the vacancy as was followed in appointing him.

ARTICLE III

The commissioners shall meet at Washington within two months after the coming into force of the present agreement. They may fix the time and the place of their subsequent meetings according to convenience.

ARTICLE IV

The commissioners shall keep an accurate record of the questions and cases submitted and correct minutes of their proceedings. To this end each of the Governments may appoint a secretary, and these secretaries shall act together as joint secretaries of the commission and shall be subject to its direction.

The commission may also appoint and employ any other necessary officer or officers to assist in the performance of its duties. The compensation to be paid to any such officer or officers shall be subject to the approval of the two Governments.

ARTICLE V

Each Government shall pay its own expenses, including compensation of its own commissioner, agent or counsel. All other expenses which by their nature are a charge on both Governments, including the honorarium of the umpire, shall be borne by the two Governments in equal moieties.

ARTICLE VI

The two Governments may designate agents and counsel who may present oral or written arguments to the commission.

The commission shall receive and consider all written statements or documents which may be presented to it by or on behalf of the respective Governments in support of or in answer to any claim.

The decisions of the commission and those of the umpire (in case there may be any) shall be accepted as final and binding upon the two Governments.

ARTICLE VII

The present agreement shall come into force on the date of its signature.

IN FAITH WHEREOF, the above named plenipotentiaries have signed the present agreement and have hereunto affixed their seals.

Done in duplicate at Berlin this tenth day of August 1922.

[SEAL] ALANSON B. HOUGHTON.
[SEAL] WIRTH.

APPENDIX F

TREATY OF BERLIN (42 STAT. 1939)

BY THE PRESIDENT OF THE UNITED STATES OF AMERICA

A Proclamation

WHEREAS, by a Joint Resolution of Congress, approved March 3, 1921, it was declared that certain Acts of Congress, joint resolutions and proclamations should be construed as if the war between the United States of America and the Imperial German Government had ended, but certain acts of Congress and proclamations issued in pursuance thereof were excepted from the operation of the said resolution;

WHEREAS, by a Joint Resolution of Congress approved July 2, 1921, the state of war which was declared by the Joint Resolution of Congress approved April 6, 1917, to exist between the United States of America and the Imperial German Government was declared at an end;

WHEREAS, a treaty between the United States and Germany was signed at Berlin on August 25, 1921, to restore the friendly relations existing between the two nations prior to the outbreak of war, which treaty is word for word as follows:

THE UNITED STATES OF AMERICA AND GERMANY

Considering that the United States, acting in conjunction with its co-belligerents, entered into an Armistice with Germany on November 11, 1918, in order that a Treaty of Peace might be concluded;

Considering that the Treaty of Versailles was signed on June 28, 1919, and came into force ac-

cording to the terms of its Article 440, but has not been ratified by the United States;

Considering that the Congress of the United States passed a Joint Resolution, approved by the President July 2, 1921, which reads in part as follows:

"RESOLVED BY THE SENATE AND HOUSE OF REPRESENTATIVES OF THE UNITED STATES OF AMERICA IN CONGRESS ASSEMBLED, That the state of war declared to exist between the Imperial German Government and the United States of America by the joint resolution of Congress approved April 6, 1917, is hereby declared at an end.

"SEC. 2. That in making this declaration, and as a part of it, there are expressly reserved to the United States of America and its nationals any and all rights, privileges, indemnities, reparations, or advantages, together with the right to enforce the same, to which it or they have become entitled under the terms of the armistice signed November 11, 1918, or any extensions or modifications thereof; or which were acquired by or are in the possession of the United States of America by reason of its participation in the war or to which its nationals have thereby become rightfully entitled; or which, under the treaty of Versailles, have been stipulated for its or their benefit; or to which it is entitled as one of the principal allied and associated powers; or to which it is entitled by virtue of any Act or Acts of Congress; or otherwise.

* * * * * * * *

"SEC. 5. All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or

under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whatsoever, and all property of the Imperial and Royal Austro-Hungarian Government, or its successor or successors, and of all Austro-Hungarian nationals which was on December 7, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or any of its officers, agents, or employees, from any source or by any agency whatsoever, shall be retained by the United States of America and no disposition thereof made, except as shall have been heretofore or specifically hereafter shall be provided by law until such time as the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively made suitable provision for the satisfaction of all claims against said Governments respectively, of all persons, wheresoever domiciled, who owe permanent allegiance to the United States of America and who have suffered, through the acts of the Imperial German Government, or its agents, or the Imperial and Royal Austro-Hungarian Government, or its agents, since July 31, 1914, loss, damage, or injury to their persons or property, directly or indirectly, whether through the ownership of shares of stock in German, Austro-Hungarian, American, or other corporations, or in consequence of hostilities or of any operations of war, or otherwise, and also shall have granted to persons owing permanent allegiance to the United States of America most-favored-nation treatment, whether the same be national or otherwise, in all matters affecting residence, business, profession, trade, navigation, commerce and industrial property rights, and

until the Imperial German Government and the Imperial and Royal Austro-Hungarian Government, or their successor or successors, shall have respectively confirmed to the United States of America all fines, forfeitures, penalties, and seizures imposed or made by the United States of America during the war, whether in respect to the property of the Imperial German Government or German nationals or the Imperial and Royal Austro-Hungarian Government or Austro-Hungarian nationals, and shall have waived any and all pecuniary claims against the United States of America."

Being desirous of restoring the friendly relations existing between the two Nations prior to the outbreak of war:
Have for that purpose appointed their plenipotentiaries:

THE PRESIDENT OF THE UNITED STATES OF AMERICA
Ellis Loring Dresel, Commissioner of the United States of America to Germany,
and
THE PRESIDENT OF THE GERMAN EMPIRE
Dr. Friedrich Rosen, Minister for Foreign Affairs,

Who, having communicated their full powers, found to be in good and due form, have agreed as follows:

ARTICLE I

Germany undertakes to accord to the United States, and the United States shall have and enjoy, all the rights, privileges, indemnities, reparations or advantages specified in the aforesaid Joint Resolution of the Congress of the United States of July 2, 1921, including all the rights and

advantages stipulated for the benefit of the United States in the Treaty of Versailles which the United States shall fully enjoy notwithstanding the fact that such Treaty has not been ratified by the United States.

Article II

With a view to defining more particularly the obligations of Germany under the foregoing Article with respect to certain provisions in the Treaty of Versailles, it is understood and agreed between the High Contracting Parties:

(1) That the rights and advantages stipulated in that Treaty for the benefit of the United States, which it is intended the United States shall have and enjoy, are those defined in Section 1, of Part IV, and Parts V, VI, VIII, IX, X, XI, XII, XIV, and XV.

The United States in availing itself of the rights and advantages stipulated in the provisions of that Treaty mentioned in this paragraph will do so in a manner consistent with the rights accorded to Germany under such provisions.

(2) That the United States shall not be bound by the provisions of Part I of that Treaty, nor by any provisions of that Treaty including those mentioned in Paragraph (1) of this Article, which relate to the Covenant of the League of Nations, nor shall the United States be bound by any action taken by the League of Nations, or by the Council or by the Assembly thereof, unless the United States shall expressly give its assent to such action.

(3) That the United States assumes no obligations under or with respect to the provisions of Part II, Part

III, Sections 2 to 8 inclusive of Part IV, and Part XIII of that Treaty.

(4) That, while the United States is privileged to participate in the Reparation Commission, according to the terms of Part VIII of that Treaty, and in any other Commission established under the Treaty or under any agreement supplemental thereto, the United States is not bound to participate in any such commission unless it shall elect to do so.

(5) That the periods of time to which reference is made in Article 440 of the Treaty of Versailles shall run, with respect to any act or election on the part of the United States, from the date of the coming into force of the present Treaty.

ARTICLE III

The present Treaty shall be ratified in accordance with the constitutional forms of the High Contracting Parties and shall take effect immediately on the exchange of ratifications which shall take place as soon as possible at Berlin.

IN WITNESS WHEREOF the respective plenipotentiaries have signed this Treaty and have hereunto affixed their seals.

Done in duplicate in Berlin this twenty-fifth day of August 1921.

[SEAL] ELLIS LORING DRESEL

[SEAL] ROSEN

AND WHEREAS, the said treaty has been duly ratified on both parts, and the ratifications of the two countries were exchanged at Berlin on November 11, 1921;

NOW THEREFORE be it known that I, Warren G. Harding, President of the United States of America, hereby proclaim that the war between the United States and Germany terminated on July 2, 1921, and cause the said treaty to be made public to the end that every article and clause thereof may be observed and fulfilled with good faith by the United States and the citizens thereof.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the seal of the United States to be affixed.

DONE at the City of Washington this fourteenth day of November One Thousand Nine Hundred and Twenty-one and of the Independence of the United States of America the One Hundred and Forty-sixth.

[SEAL] WARREN G. HARDING

By the President:
CHARLES E. HUGHES
Secretary of State.

Office - Supreme Court,
FILED
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CHARLES ELMORE CR
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No. 254.

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

HOMER S. CUMMINGS, ATTORNEY GENERAL OF THE UNITED STATES, AND W. A. JULIAN, AS TREASURER OF THE UNITED STATES,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, A CORPORATION.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

AMICUS CURIAE

BRIEF ON BEHALF OF THE SWISS NATIONAL INSURANCE COMPANY, LTD.

HARTWELL CABELL,
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New York City.

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Of Counsel.

The Evening Post Job Printing Office, Inc., 80 Lafayette St., New York, N. Y.

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No. 254

IN THE

Supreme Court of the United States

OCTOBER TERM 1936

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO GESELLSCHAFT, a Corporation.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

AMICUS CURIAE.

BRIEF ON BEHALF OF THE SWISS NATIONAL INSURANCE COMPANY, LTD.

The purpose of this brief is to discuss a proposition of law involved in the decision of this case which also applies to a case now pending in the Supreme Court of the District of Columbia. There the Swiss National Insurance Company, Ltd., a Swiss corporation, is suing the Attorney

General and the Treasurer of the United States under the permission granted by Section 9 of the Trading with the Enemy Act, as amended, for the balance of the eighty percent of its property returnable to it under the Settlement of War Claims Act and Section 9 of the Trading with the Enemy Act, as amended. In that case the formal consent of the claimant to the retention of twenty percent of the seized funds has been executed and filed as required by law. The suit was commenced before the enactment of Public Resolution No. 53.

In the instant case the court below reached the conclusion (among others), that the Act restoring the appellant's property established a vested right in appellant (respondent here), which was not affected by the subsequent passage of Public Resolution No. 53. Upon this point we have nothing to add to the brief filed in this court on behalf of respondent.

The court below also concluded that by the terms of subdivision (m) of Section 9 of the Trading with the Enemy Act, as amended, the United States had consented to be sued in cases involving the return of property under Section 9 and "that it never had withdrawn its consent." While we are entirely in accord with this construction of Public Resolution No. 53, it left out of consideration one phase of the question involving the remedy which may come before this court for determination.

The court of first instance held that the effect of the Resolution was to withdraw the consent of the United States to be sued. With this conclusion the Court of Appeals disagreed and as a consequence the power of the Congress to withdraw the right to sue was not dwelt upon. That question becomes of first importance if this court should agree with the Supreme Court of the District and construe Public Resolution No. 53 as deliberately intended by Congress to withdraw the right to sue, or to abate or suspend that right, even though suits had been

instituted, and were still pending at the time the Resolution was drafted.

This argument is addressed to the single question whether under our system of constitutional government the Congress may abate or impair the remedy previously authorized by Congress where there is a vested property right in the claimant protected by the Fifth Amendment to the Constitution, and where the owner of this right has already commenced a suit in a Federal Court against the officials of the Government in control of the funds as prescribed by the Act of Congress ordering the return of the property.

Our contention is that:

The power of Congress to revoke or withdraw a right to sue the Government or its officials does not extend to suits brought to enforce rights which have vested, and are therefore within the protection of the Fifth Amendment.

In announcing the decision of a majority of this court in *United States* v. *Lee* (106 U. S. 196, 207), Mr. Justice Miller said:

> "While the exemption of the United States and of the several states from being subjected as defendants to ordinary actions in the courts has since that time (the date of the announcement of the decision of the Supreme Court in Cohens *v.* Virginia, 6 Wheat. 264—March 3, 1921) been repeatedly asserted here, the principle has *never been discussed or the reasons for it given*, but it has always been treated as an established doctrine." (Italics ours.)

This decision was announced in 1882. An examination of the cases decided since then, involving sovereign immunity, reveals, with few exceptions, the same absence of discussion of either the legal or historical basis for this oft reiterated aphorism.

The great body of our common law was drawn from England, and it is quite natural that our legal vocabulary

coming from the same source should be given definitions also drawn from that source. Hence the word "sovereign" as applied to the *Government* of the United States was from the earliest days given the same meaning as that ascribed to it by the English authorities in referring to their King, Lords and Commons. But the English conception of sovereignty is misleading when applied to our form of government.

At the time of, and before the American Revolution, the Parliament of Great Britain, in its three-fold combination of King, Lords and House of Commons, was the actual sovereign, the first two in their own right, and the last in its representative capacity. They were bound by no rules, regulations or limitations imposed by a superior authority. A rule or law or statute created by their joint consent was absolute and binding throughout the realm. Life and property could be taken and prior laws annulled at the will of this tripartite sovereignty. The only protection of the British subject under the English form of government consisted in certain unwritten rules, not of "positive law" but of "positive morality", which in the aggregate are often referred to as "the British Constitution." These rules Parliament has seen fit to follow and be guided by for so long a period that they have come to be considered as morally and ethically binding upon it; but there is no legal control and Parliament may discard or disregard any or all of them at will.

Turning to our own country, the transitory period between the Declaration of Independence and the adoption of the Federal Constitution, is of some interest in this discussion, as bearing upon the Constitution drafted by the Convention of 1787 and the Bill of Rights appended thereto in the form of the first ten amendments. An interesting treatment of this phase of the political development of the country is contained in Professor Burgess' Work on Political Science and Constitutional Law (Vol. I, Chap. 2). It is quite clear from the history of that period,

that the Colonies had become a "State" as that term is used in political science, upon the severance of the ties which had theretofore bound them to the Mother Country. The difficulties which led to the adoption of the Federal Constitution resulted from a clash between the several emancipated Colonies and the Central Government that had been established under the Articles of Confederation, as to the distribution and exercise of the sovereign powers inherent in the newly created "State" or "Nation", as between state and national governments.

By the adoption of the Constitution and the establishment of the Federal Government, the demarcations between the national Government and the Governments of the several states were more clearly defined, but the ultimate national sovereignty continued to rest in the people as a whole. As to those powers expressly delegated by the people to the executive and legislative arms of the Federal Government, that Government is undoubtedly supreme; but as to the powers which are reserved to the people by the provisions of the Constitution, no analogy exists between the King, Lords and Commons of Great Britain and the President, Senate and House of Representatives of the United States. While the former were free and untrammeled, the latter are controlled and bound within the express powers delegated to or conferred upon them by the written provisions of the Constitution which emanated from the Sovereign People. That Constitution is the supreme law of the land—a law, as has been repeatedly held by this court, which can be violated by no act of Congress although concurred in by the President, Senate and House of Representatives.

Several reasons for the principle of sovereign immunity from suit have been given by courts and writers on political science. In England it has been explained on the theory that all process is issued and served by the King, and it would be absurd for the King to serve himself.

Another reason advanced both in England and here is that to hold otherwise would be to subject the Government to endless litigation, resulting in a serious interference with its proper functioning. Mr. Justice Miller in *United States* v. *Lee* (*supra*), after quoting language from the opinion of Mr. Justice Gray of the Supreme Court of Massachusetts in *Briggs & Another* v. *Light Boats,* (11 Allen [Mass.] 157), to the effect that it would be inconsistent with the very idea of supreme executive power, and would endanger the performance of the public duties of the soveriegn to subject him to repeated suits as a matter of right, at the will of any citizen, said at page 206:

> "As no person in this government exercises supreme executive power, or performs the public duties of a sovereign, it is difficult to see on what solid foundation of principle the exemption from liability to suit rests."

The rule of sovereign immunity from suit stands on firmer ground. It is predicated upon a supreme power to make, revoke, alter and amend all law, which by necessary implication includes the power to refuse to submit to legal process unless consented to. Mr. Justice Holmes put it tersely in *Kawananakoa* v. *Polyblank,* 205 U. S. 349, 353, where he states:

> "A sovereign is exempt from suit, not because of any formal conception or obsolete theory, but on the logical and practical ground that *there can be no legal right as against the authority that makes the law on which the right depends.*" (Italics ours.)

Accepting this as the basis of sovereign immunity, let us apply it as a test to the instant case. Here the law upon which the respondent (plaintiff below) relies for its protection as the owner of a vested right, is not the law of Congress under the terms of which a part of its property was to be returned to it upon certain conditions, but the provision of the Constitution which protects its vested

rights. That law emanates not from Congress but from the Sovereign People of the United States who created and controlled Congress. The power to destroy or impair this right lies not with Congress, but rests in the people themselves; and its destruction or impairment in accordance with the principle enunciated by Justice Holmes may be accomplished only by proper amendment, by the Sovereign People, of the organic law which they made and which they have declared to be "the supreme law of the land."

Our courts have not hesitated to declare invalid acts of Congress which attempt directly to impair or destroy rights, the protection of which is guaranteed by the Constitution. How can an attempted impairment or destruction of such rights be justified when it is sought to be accomplished not directly, but indirectly by the withdrawal, impairment or suspension of the right to recover and collect a judgment for the amount ordered to be returned to it, and to which it is now entitled.

In *Bronson* v. *Kinzie* (1 How. 311, 317), the court said:

> "But it is manifest that the obligation of the contract, and the rights of a party under it, may, in effect, be destroyed by denying a remedy altogether; or may be seriously impaired by burdening the proceedings with new conditions and restrictions, so as to make the remedy hardly worth pursuing."

And again:

> "In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

It is no answer to say that by the provisions of the Constitution, with the exception of the original jurisdiction in certain cases conferred upon the Supreme Court by that instrument, the duty to create tribunals and to

prescribe their jurisdiction and procedure is placed upon the Congress. If they had failed in that duty the remedy was in the electors.

Our question here is a different one. Congress under the power granted them passed a law, under the terms of which a German, by the execution and filing of a certain instrument, could acquire a vested right in and the return of a part of the property which had belonged to him, and which had been seized by the United States under its war powers. Congress went further, and by Section 9 of the Trading with the Enemy Act, as amended, expressly gave him the right to sue the United States officials who were in possession and control of such property, should they refuse to deliver the same. It now attempts to withdraw that right and by such withdrawal, even if only temporary, the right is impaired, and, if permanent, it is practically destroyed.

By the terms of the resolution the right to recover these funds is suspended (subject to voluntary executive action) so long as the German Government shall fail to fulfill certain treaty obligations involving the payment of large sums of money. That such a suspension is tantamount to a destruction of the right, no one who is familiar with the present European conditions and with the history of the past few years can doubt.

An examination of the cases dealing with sovereign immunity indicates a growing doubt in the minds of our judges as to its universal application to the acts of Congress. In *Choate* v. *Trapp* (1912), 224 U. S. 665, 671, this court said:

> "* * * there is a broad distinction between * * * the power to abrogate a statute, and the authority to destroy rights acquired under such law."

A decision of Judge Julian W. Mack sitting in the District Court for the Southern District of New York, in a camparatively recent case (*The Pesaro,* 277 Fed. 473, 474,

[1921]), wherein the question of sovereign immunity entered, reflects the leaning of our courts towards placing limits upon the doctrine. The learned Judge after an exhaustive examination of the authorities said:

> "While the principle has been fervently defended by some jurists as vital and fundamental to sovereignty * * * the extent to which it has been carried or retained in modern law has been the subject of strong criticism * * * and there is observable a tendency to restrict its application or to guard against its extension. * * *
>
> "Where the application of the doctrine is not clear, a solution is not to be found by reference to strict Austinian theory which assumes by mere definition, that the sovereign is not subject to his own laws. Nor is it to be found by uncritical reference to historical origins. The reasons which in the past led to the exemption of the sovereign from suit may or may not justify the extension of the principle in modern law."

It is interesting to note the pains to which our judges have gone in reiterating the immunity rule as a fundamental principle of our law, and at the same time avoiding the consequences of its application in cases where such application would work injustice.

In only one case (*Filbin Corporation* v. *United States* [1920], 266 Fed. 911), do we find any attempt to examine into the source of the principle of sovereign immunity and the extent of its application to our form of government. The District Judge in that case, while admitting the general recognition of the doctrine by our courts, after a brief but masterly analysis of its historical derivation, denies its application in this country where vested rights have been infringed.

One of the earliest cases was *United States* v. *Clarke* (8 Peters, 436 [1834]), decided by Chief Justice Marshall. There a grantee from the Spanish Crown of lands in Florida prior to its cession to the United States sued

for its enforcement. The court while holding that the United States was not suable of common right and that the party to a suit against them must bring his case within the authority of some act of Congress, *held* that the law which conferred jurisdiction upon the Superior Court of East Florida of "all remaining cases which have been presented according to law and not finally acted upon" was sufficiently broad to give to that court jurisdiction of the case.

One line of authorities while denying the right of suit against the Government permits the action to be brought against governmental agents whose acts were directly responsible for the situation out of which the suit arose.

Meigs v. *McClung*, 9 Cranch, 11 (1815);
Carr v. *United States*, 98 U. S. 433 (1878);
United States v. *Lee*, 106 U. S. 196 (1882);
Belknap v. *Schild*, 161 U. S. 10 (1895);
Philadelphia Co. v. *Stimson*, 223 U. S. 605 (1911).

Another line of cases, mostly in Admiralty, hold that while the Government cannot be recovered against if the proceeding is *in rem*, the immunity does not prevent a lien attaching to the *res* which is the subject matter of the action, nor the enforcement of that lien by its owner against the rights of the United States Government in the same *res*.

United States v. *Wilder*, Federal Cases No. 16694 (1838);
The Siren, 7 Wall. 152 (1868);
The Davis, 10 Wall. 15 (1869).

The authorities cited below hold that the rule of Government immunity does not apply where the Government with respect to the transaction in question is acting not in a governmental but in a commercial capacity.

The Pesaro, 277 Fed. 473 (1921);
Rosenberg Bros. v. *United States Shipping Board Emergency Fleet Corp.*, 295 Fed. 372 (1923).

In *Oak Worsted Mills* v. *United States,* 36 Fed. (2d) 529 (1929), the case while reiterating the doctrine of sovereign immunity from suit, held that there was no vested right in question.

Perhaps no authority has been cited oftener than *De Groot* v. *United States* (5 Wall. 419). De Groot entered into a contract with the United States to furnish it with a large quantity of bricks. There was some delay in the work and De Groot having laid out a good deal of money in his enterprise, which included the purchase of a large brickyard, applied to Congress for relief. Congress passed a Joint Resolution authorizing the Secretary of the Treasury to settle De Groot's claim on *principles of justice and equity,* provided there should be a surrender to the United States of all the brick made, all the machinery and appliances and other personal property, and that the contract be cancelled. After the passage of this resolution De Groot deeded to the United States all the brick made, together with all the machinery and appliances and other personal property, and leased the brickyard, sheds, etc. for a period of ten years until the completion of the work. Thereafter the Secretary of the Treasury awarded him $29,000. De Groot received a part of this award but being dissatisfied with it as too small, again petitioned Congress. Thereupon that body passed another resolution directing the Secretary of War to settle the account on principles of justice and equity. Under this resolution the Secretary of War made an award showing a balance due De Groot of over $100,000. This award for some reason was not paid. Thereafter Congress passed another Joint Resolution repealing the prior Resolution and directing that the papers be transmitted by the Secretary of War to the Court of Claims for adjudication. In that court De Groot, submitting to its jurisdiction, filed his petition and asked that the amount found to be due him by the award of the Secretary of War be paid him.

The Court of Claims held that under the language of the last Resolution it could not consider the award but that

its only jurisdiction lay in an examination of the claim *de novo*. That contention was sustained by this court.

It is difficult to spell out of these rather complicated facts any vested right in De Groot. The terms of the conveyance of the brick, etc. under the first Joint Resolution are not in accordance with the terms of the Resolution itself, as that called for a transfer of title and a lease was substituted for a deed. The case apparently turned upon the terms of the Resolution of Congress conferring jurisdiction of the case upon the Court of Claims. De Groot submitted to this jurisdiction by filing his petition, and the only question apparently considered by the Court of Claims was whether it could act upon the award made by the Secretary of War, or whether they should consider the claim *de novo*. This was a narrow question of construction of a resolution and had nothing to do with the impairment of a vested right. It may well be that if De Groot had refused to submit to the jurisdiction of the Court of Claims and had sued in a court of general jurisdiction upon the award, the result might have been different. The power of Congress to impair a vested right as we read the decision was not involved.

Smallwood v. *Gallardo* (1927), 275 U. S. 56, 61, involved the constitutionality of an Act of Congress prohibiting suits to enjoin the collection of taxes imposed by the laws of Porto Rico. The petitioner claimed that the law was retroactive and that it took away a vested right. This court *held* first, that the law was not retroactive; and secondly, that there is no vested right to an injunction against the collection of illegal taxes. In this connection the court used the following significant language:

> *"This statute is not like a provision that no action shall be brought upon a contract previously valid, which in substance would take away a vested right if held to govern contracts then in force."* (Italics ours.)

The clear implication is that there is a limit to the control of Congress over the jurisdiction and procedure

of the lower courts and that that limit has been passed when a withdrawal of a remedy interferes with a vested right protected by the Constitution.

One other case invites comment. In *Lynch* v. *United States* (1934), 292 U. S. 571, the act of Congress which repudiated its obligations under war risk insurance contracts was challenged as an invasion of the vested rights of the petitioner.

While again proclaiming sovereign immunity from suit, this court held the law to be invalid as an infringement of vested rights. In dealing with the withdrawal of the right to sue the court said (p. 583):

> "The question requiring decision is, therefore, whether in repealing 'all laws granting or pertaining to yearly renewable term insurance' Congress aimed at the right or merely at the remedy. It seems clear that it intended to take away the right; and that Congress did not intend to preserve the right and merely withdraw consent to sue the United States. As Congress took away the contractual right it had no occasion to provide for withdrawal of the remedy. Moreover, it appears both from the language of the repealing clause and from the context of § 17 that Congress did not aim at the remedy. The clause makes no mention of consent to sue. The consent to sue had been given originally by § 405 of the Act of 1917, which, like the later substituted sections, applied to all kinds of insurance, making no specific reference to yearly renewable term policies. Obviously, Congress did not intend to repeal generally the section providing for suits."

And again (p. 587):

> "But it is not to be assumed that Congress would have resorted to the device of withdrawing the legal remedy from beneficiaries of outstanding yearly renewable term policies if it had realized that these had contractual rights."

In the instant case, there is no specific rescission of Section 9 of the Trading with the Enemy Act and no express prohibition against suits. If Joint Resolution No. 53 is to be construed along similar lines with the act under consideration in the *Lynch* case, it is difficult to escape the conclusions reached by the court below. If it is held that the effect of the Joint Resolution is to withdraw the remedy, we are face to face with the proposition, in view of the broad language of the *Lynch* decision, that Congress has the power under the Constitution to destroy a vested right by indirection, to wit: the rescinding of the only procedure by which that right can be enforced.

It is difficult to reconcile such a conclusion with the language of this court in *Bronson* v. *Kinzie* (*supra*):

> "In vain would rights be declared, in vain directed to be observed, if there were no method of recovering and asserting those rights when wrongfully withheld or invaded. This is what we mean properly when we speak of the protection of the law."

A reconsideration and further demarcation by this court of the limits to be placed upon the application of the doctrine of sovereign immunity under our form of government is of wider interest than attaches to the rights of a few German nationals seeking to recover a part of their property which had been seized under the war powers of this Government.

One of the necessary consequences of the prodigious development and spread of the administrative machinery of our Government during the last few years is that *quasi* judicial powers are entrusted to Government officials or to boards and commissions instituted under a multitude of Federal statutes. These instruments of the executive are constantly called upon to take action affecting contractual and other vested rights of our own citizens, which are intended to be protected by the Fifth Amendment and

other provisions of our Constitution. That protection may amount to nothing if it is within the power of Congress to withdraw the right to appeal to our courts, thereby giving binding effect to the acts of the executive branch of our Government.

Respectfully submitted,

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FILED
JAN 12 1937
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1936.

No. 254

HOMER S. CUMMINGS, Attorney General of the United States, and W. A. JULIAN, as Treasurer of the United States,

Petitioners,

v.

DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

REBUTTAL BRIEF FOR THE RESPONDENT

THOMAS H. CREIGHTON, JR.,
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DEUTSCHE BANK UND DISCONTO-GESELLSCHAFT, a Corporation.

REBUTTAL BRIEF FOR THE RESPONDENT

Preliminary Statement

This brief is filed, pursuant to permission of the Court in rebuttal to the reply brief of the petitioners served on the morning of the first day of the argument.

To recapitulate the respondents' general argument: While Congress has from the beginning recognized a beneficial interest of the Germans in the property seized, the Trading with the Enemy Act under which the property was

originally taken over, reserved to Congress its future disposition (Section 12, Trading with the Enemy Act). The power so reserved to Congress has been exercised by that body in a series of Acts granting partial returns and finally terminating in the Settlement of War Claims Act whereby Congress revested in the former enemies title to the property upon condition that they consent to the temporary retention of 20%. By this Act, Congress, in revesting the original owners with the title and right of possession in the property, exhausted the powers reserved to it in the Trading with the Enemy Act, except as to the 20% and any attempt on the part of Congress now to withhold the property from the owners thereof amounts to an effort to recapture German property long after the war has ceased and after the right of seizure under the war power has terminated.

Upon the argument the question was asked whether action by the President was a condition precedent to the owners' right of repossession of the property. An examination of Section 9 (a) and 9 (c) of the Trading with the Enemy Act, as amended by the Settlement of War Claims Act, clearly demonstrates that such action is unnecessary, and therefore not a condition precedent to the right of repossession.

Furthermore, in petitioner's reply brief (p. 9), it is stated that we question the statement made in the petitioners' brief that they were advised by the Secretary of State that the German Government had made no claim that the Resolution is in conflict with its treaties.

It appears from the letter of the Acting Secretary of State (p. 16 petitioners' reply brief) that the German Government did make such a protest formally but orally.

POINT I.

The rights acquired by respondent, an alien friend, were subject to our Constitution and could not thereunder become the subject of reprisal.

Section 11 of the Settlement of War Claims Act of 1928 (45 Stat. 254) amended subsection (b) of Section 9 of the Trading with the Enemy Act as amended so as to give to German nationals, upon filing the consent under subsection (m) of Section 9, as thus amended, the same rights as to 80% of their property, as non-enemies were granted under Section 9 of the original Trading with the Enemy Act.

Certainly, as to property of an alien non-enemy, withheld because our Government had seized the same under the mistaken belief that it was enemy property, no power short of war could authorize our Government to subject that property to seizure because of the acts of the owner's government, such as the nonpayment of a public debt owing by that government.

Our former Allies, Great Britain and France, have defaulted in their obligations to our Government, and we do not believe that there is anyone who will contend that the property of a few of its nationals could be seized in peace time under this paramount power mentioned by the petitioners on pages 11 to 15 of their reply brief.

In their reply brief the petitioners refer to the actions of other governments. Nothing is better known than that these other governments, such as Great Britain and its Parliament, are not subject to any written constitution.*

*Burgess, Political Science & Constitutional Law, Vol. 2, p. 364.

The effort to overcome the difficulties of foreign exchange transfer, based partly on agreements, bears no analogy to the present case. But the beneficent provision of Amendment 5 of our written Constitution prohibits the seizure of property of an alien friend, without just compensation.

Russian Volunteer Fleet Corp. v. *U. S.*, 282 U. S. 481.

Under *Brown* v. *United States*, 8 Cranch. 110, even war itself does not authorize confiscation. It requires an act of Congress to authorize the President to exercise the privilege of confiscation.

Speaking of the acts of French spoliation, the Court of Claims in *Hooper* v. *United States*, 22 Ct. Cl. 408, says the following (p. 456):

> "To term the decrees of France and the acts of their privateers under them 'acts of reprisal' does not alter the facts or the legal position. That position has been defined by the Supreme Court of the United States as limited partial war.* We, following the path indicated by that tribunal, have defined it as 'limited war in its nature similar to a prolonged series of reprisals.'" (Asterisk ours.)

Therefore, under this language, what the petitioners are advocating is limited warfare against private property by authorizing the reseizure of private property of a friendly alien. Such is not permitted under the law, as pointed out by this Court in *Chae Chan Ping* v. *U. S.*, 130 U. S. 581, where the court referred to property rights in the following language:

**Bas* v. *Tingy*, 4 Dallas 322.

> "The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, * * *"

In fact, Public Resolution #53, involving the reseizure of German property, may be regarded a violation of the present Treaty between the United States and Germany (44 Stat. (Part 3) 2132) which provides that the property of German nationals

> "shall not be taken without due process of law and without payment of just compensation".

As authority for the proposition of this right of reprisal, petitioners refer to Hyde's International Law, Chiefly as Interpreted and Applied by the United States, Volume Two, 174-179, where the author says (p. 179):

> "Notwithstanding a disclaimer of hostility against a State upon which reprisals are made, the nature of the procedure is one still calculated to produce war. Hence countries not desirous of bringing about such a condition are reluctant to have recourse to such action unless the delinquent State is so inferior in point of military or naval resources that its indignation is not to be dreaded. Reprisals are essentially the remedy of the strong against the weak. It is unlikely, therefore, that the United States will ever again make use thereof, unless the State itself has suffered a national affront through a grave violation of international law, and unless its adversary remains stolidly indifferent as to its duty to make amends. It is believed, moreover, that both policy and sound practice discountenance the employment of reprisals so long as any amicable mode of obtaining justice remains unexhausted."

In the past few weeks there has been much argument that under the alleged justification of dealing with foreign affairs, the Government can do anything it likes, even with respect to private property. *United States* v. *Curtiss-Wright Export Corporation*, decided December 21, 1936, specifically distinguished the power of the Executive to act at his discretion in foreign affairs and in domestic affairs. It did not authorize him to violate private property rights in the United States which, it must be assumed, still enjoy the protection of the Fifth Amendment. In fact, the Court said, with reference to the power of the President in international relations, that the same

> "must be exercised in subordination to the applicable provisions of the Constitution".

To exert an act of reprisal, is an act of war.

Jefferson stated that

> "The making a reprisal on a nation is a very serious thing. Remonstrance and refusal of satisfaction ought to precede; and when reprisal follows, it is considered an act of war, and never failed to produce it in the case of a nation able to make war; * * *." (Opinion of May 16, 1793, 7 Jefferson's Works, 628; Moore's Digest 7, 123.)

Attorney-General Randolph in 1793 stated:

> "The law of nations does not allow reprisals, except in cases of violent injuries directed and supported by the state, and the denial of justice by all the tribunals and the prince." (Moore's Digest 7, 120.)

Congress did not purport to exercise the war power or the reprisal power in enacting the Public Resolution #53.

They simply undertook to amend the Settlement of War Claims Act unilaterally by withholding what they had already granted. The reprisal power has never been exercised by the Congress of the United States and it should not be deemed to have been invoked except on clear demonstration that that was the intention. Even so, when done in time of peace, the private property of a few scattered individuals cannot be selected for the exertion of this power.

It is true that President Jackson in 1834 did *threaten*, if France did not appropriate monies it had agreed to appropriate, that he *might* recommend to the Congress the seizure of the property belonging to the French Government, its citizens or subjects. (Moore's Digest 7, 124.) But this was done at the instigation of parties in France who desired this pressure to be exerted on the French Government. (Moore's Digest 7, 124.) The very suggestion aroused violent protest in the United States and Senator Clay for the Committee on Foreign Relations declined to approve the suggestion. (Moore's Digest 7, 126, 127.)

In referring to Jackson's proposal, which Congress repudiated and never acted upon, Mr. Gallatin, our former Secretary of the Treasury and Minister to France, stated in 1835:

> "The British, in case of war, seize every vessel in their ports belonging to the enemy. With this single exception, the relic of an age of barbarism and piracy, and which makes part of the King's droits of admiralty, I am not aware that any civilized nation does at this time, even in case of war, seize the property of private individuals which in time of peace had been trusted to the hospitality and good faith of the country. I am certain that the United States never were guilty of such an act as a

nation, neither in 1793, when the British were plundering without notice our West India trade, and when an unsuccessful motion to that effect was made, never to be again repeated, nor in 1798, at the time of the greatest excitement and quasi-war against France, nor when war was declared against England, in 1812. Since the motion of 1793, which, if brought to the test, would have been indignantly rejected, during the various periods when our trade was exposed to the depredations of one or both the belligerents, amongst all the devices and expedients proposed in order to avoid war, never was the iniquitous proposal of seizing property confided to the protection of our laws again suggested. And I trust that, whilst so much is said of what is due to the honor of the nation (how applicable to the present state of things is another question), such truly dishonorable act is not in contemplation.

"The preceding observation is strictly correct with respect to seizures in time of peace, and is intended to show the gross impropriety of supposing that such seizures are a peace measure. I admit that they have sometimes taken place in time of war. Such was the sequestration by several of the States of the British debts during the war of independence. Russia also suspended the payment of the interest on a loan formerly contracted in Holland whilst she was at war with France, of which Holland had become a province. Yet these are not examples for imitation. The seizure without violence of property belonging to the offending Government and not to individuals would, I think, be legitimate in some cases." (Mr. Gallatin to Mr. Everett, Jan. 5, 1835, 2 Gallatin's Writings, 476, quoted Moore's Digest 7, 121).

Before disregarding the requirements of the Fifth Amendment, and the honorable history of this nation, the

Court should be satisfied beyond the peradventure of a doubt that Congress was engaged in undertaking an act of war in the form of a reprisal and that it is empowered to do this with respect to the selected property of a few private individuals. Such a power we respectfully deny, and there is no evidence that Congress ever considered that it was exerting the reprisal power. The honorable traditions of this nation should not be thus casually changed and a justification given which Congress never thought of. The effect would be quite as damaging as those mentioned in the arguments of John Bassett Moore, with which this rebuttal brief will close.

POINT II.

In view of the language of the Knox-Porter Peace Resolution, it is immaterial that Germany has or has not made suitable provision for the satisfaction of American claims, although Congress acted on the assumption in 1928 that "suitable provision" had been made.

The Knox-Porter Peace Resolution (Brief of Respondent, p. viii. of Appendices) provides:

> "All property of the Imperial German Government, or its successor or successors, and of all German nationals, which was, on April 6, 1917, in or has since that date come into the possession or under control of, or has been the subject of a demand by the United States of America or of any of its officers, agents, or employees, from any source or by any agency whasoever, * * * shall be retained

> by the United States of America and no disposition thereof made, except as shall have been heretofore or *specifically hereafter shall be provided by law* until such time as the Imperial German Government * * * shall have * * * made suitable provision for the satisfaction of all claims against said (Government) * * *." (Italics ours.)

The Knox-Porter Peace Resolution is repeated in the Treaty of Berlin (brief of respondent, p. xxxi, of Appendices).

The modifying language

> "except as shall have been heretofore or specifically hereafter shall be provided by law",

needs no argument to show that when, seven years after the date of the Joint Resolution of 1921, Congress passed the Settlement of War Claims Act, that Act constituted one of the exceptions mentioned in the Joint Resolution, so that its necessary effect was that it was thereby "provided by law" that such property, to the extent to which its return was ordered, thereby should no longer be held by the United States.

POINT III.

Congress had determined at the time of the passage of the Settlement of War Claims Act that Germany had made "suitable provision" for the satisfaction of American claims.

Taking for granted that the provision referred to under Point II of this brief is immaterial and that Congress in-

tended to hold the property until "suitable provision" had been made by Germany for the satisfaction of claims against it, Congress effectually determined that such "suitable provision" had been made.

The Settlement of War Claims Act was passed after Germany admitted to the Allies its complete incapacity to pay the enormous claims that the Allies had set up against Germany. This admitted incapacity resulted in 1924 in the appointment of the Dawes Commission to ascertain Germany's capacity to pay, and the investigation by the Dawes Commission resulted in the Paris Agreement, by virtue of which the United States received for the satisfaction of the claims of American nationals against Germany 2¼% of the reparation payments. (Hearings before Committee on Ways and Means, and Committee on Interstate and Foreign Commerce, 69th Congress, 1st Session, April 5 to 14, 1926, p. 23.)

Thereupon, in 1926 the Administration proposed of its own motion to return the German property, because it was recognized to be contrary to American interests to hold private property as security for a public debt. The wisdom of the fathers, notably Hamilton, had shown the destructiveness of such a policy. Messrs. Mellon and Mills, therefore, urged that the property be at once returned in full to its rightful owners. (Hearings before Committee on Ways and Means and Committee on Interstate and Foreign Commerce, 69th Congress, 1st Session, April 5 to 14, 1926, pp. 200 *et seq.;* Hearings before Committee on Ways and Means, House of Representatives, 69th Congress, 1st Session, April 16, 26, 28, and May 5, 1926, p. 76.) The objections of the American claimants made some compromise with principle necessary, so that in 1928

an inter-party agreement was reached, which was embodied in the Settlement of War Claims Act [on the basis of which Congress passed the Settlement of War Claims Act providing for mutual concessions (referred to on page 44 of respondent's brief)], whereby, amongst other things, 50% of the awards for German ships and patents should be applied to the payment of American claims, the 26 million dollars of unallocated interest fund in the hands of the Treasury should also apply to the payment of American claims, and likewise the annual 14 million dollars of Dawes' payments.

This was fully explained to Congress at Hearings before the Committee on Ways and Means of the House of Representatives, 69th Congress, Interim 1st and 2nd Session, November 15 to 24, 1926, page 390. It was there explained that American representatives went to Paris and agreed that Germany could not do any more than was provided for in the Paris Agreement, and Congress, having heard these proofs, and having before it the Paris Agreement, and having received the agreement made between the American claimants and the German claimants, enacted the Settlement of War Claims Act and thus, by approving the agreement thus made between the American claimants and German claimants, determined that "suitable provision" had been made in accordance with the Knox-Porter Peace Resolution. In other words, "suitable provision" did not mean payment, but meant provision for payment under the circumstances.

Thus, having amended the Trading with the Enemy Act by the Settlement of War Claims Act, thereby providing, amongst other things:

> for certificates to be issued to German owners with property in the Special Deposit Fund, consisting partly of the retained 20% (Section 25),

and

> for attachments of claims of creditors of the German owners (Section 30),

Congress indicated the complete vesting of the beneficial title in the former German owners—a title very similar to that acquired by an applicant for Government land patents upon allowance of his claims and before the actual transfer of the property, the subject of the patent, to the applicant. (*Wirth* v. *Branson,* 98 U. S. 118.)

POINT IV.

The return of enemy property was not a mere gratuity.

On page 4 of the reply brief of the petitioners, it is contended that the respondent has not demonstrated in its former brief that the Settlement of War Claims Act is not an act of grace.

In respondent's previous brief (page 72), reference is made to the case of *Williams* v. *Heard,* 140 U. S. 529, and we quoted the very important language therein contained with reference to the distribution of the unappropriated moneys from the Geneva award:

> "There is no element of a donation in the payment ultimately made in such cases."

It has been repeatedly pointed out by leading text writers of international law* that until the Great War of 1914-1918 it was not the practice of civilized nations, and was a violation of international law, to indulge in confiscation of private property.

We also pointed out (page 9 of respondent's brief), that on February 8, 1917, President Wilson, in response to suggestion that the Germans would withdraw their property in accordance with the Treaty of 1828, (8 Stat. 378) announced to the world that

> "The Government of the United States will in no circumstances take advantage of a state of war to take possession of property * * *. *It will scrupulously respect all private rights alike of its own citizens and of the subjects of foreign states.*" (Italics ours.)

If there is any language which creates an estoppel on our Government, moral and, therefore, legal, it is this assurance of its President, causing German nationals to allow their property to remain here because their "private rights" would be "scrupulously" respected.

Could language be clearer to negative the extraordinary argument (pp. 14-15, Petitioner's Reply Brief) that

> "it is difficult to understand how any claimed rights of respondent with respect to this property can be said to be private property such as the Fifth Amendment is intended to protect"?

The petitioners now take the position that such return is a mere gratuity and not the observance of an honorable obligation.

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*"International law is part of our law," The Paquete Habana, 175 U. S. 677, 700.

If there is such obligation, in international law, in the national tradition, in the honorable observance of solemn promises of the President, how can the petitioners contend that the return of the property thereof was a mere kindness on the part of our Government?

POINT V.

The consent required by Section 9, Subsection (m), was not an idle ceremony.

Contending that the direction for the return of 80% of the German property was a mere gratuity, the petitioners claim that no contract arose between our Government and the German owner upon the filing of the consent required by Section 9, subsection (m), and that there was no consideration in law given by the former owner when he filed this consent to the retention of 20% of his property.

Under a previous point, we have shown that the return of the property was an honorable, moral obligation on the part of the Government. It was also elementary self-interest, as the Secretary of the Treasury contended. This obligation may not have been enforceable if Congress desired to confiscate the property.

We have also pointed out that the prevailing rule of international law was against confiscation and that the United States committed itself to return the property by the Act of 1928. Under this Act, a German owner was recognized as such by Congress, and was given the legal right to demand the return of the property. The very fact that his consent to the temporary retention of 20% was asked, is an admission and recognition of his status as an owner.

Therefore, whatever may have been his strict legal right theretofore to make an enforceable demand, an ample consideration for the return of 80% was found in the surrender of his claims then also to receive the 20%.

POINT VI.

The provision in the Treaty of Versailles that a German national should look to his government for compensation, was fully considered by Congress and waived by it.

The petitioners contend that a German national should look to his Government for compensation and that the Treaty of Versailles so provides and, therefore, the German national has no rights against our Government.

This contention is based on the false assumption that Congress had already confiscated the property. Only then could the claim against Germany arise.

Prior to the enactment of the Settlement of War Claims Act, this provision was fully considered by Congress. In answer to the question put to it by our Department of State, on April 20, 1926 the representative of the German Government made the following statement (69th Congress, 2nd Session, Document No. 191, p. 18):

> "German nationals whose property in the United States was taken over by the Alien Property Custodian under the trading with the enemy act have not received any compensation under the laws quoted in the annex and are not entitled thereto for the

> reason that their property has not been confiscated, but is merely being retained by the United States. If such property were to be confiscated by the United States they would thereby become entitled to the same rates as allowed to Germans whose property was confiscated by the allied powers. As, however, the assets held by the United States consist almost exclusively of cash and securities the percentage to be applied would, with a few exceptions, be 2 per cent of the pre-war value for assets not exceeding 200,000 marks in each particular case and two-tenths of 1 per cent for all amounts exceeding this figure."

Germany's incapacity to pay its foreign debts was fully understood by Congress, yet, with all these facts before it, Congress passed the Settlement of War Claims Act revesting the beneficial title in the former German owners. As pointed out in the brief of the respondent (p. 95), this clause of the Versailles Treaty is purely illusory and Congress so regarded it. It cannot be considered as a substitute for property which Congress repeatedly said was not to be confiscated.

With all these facts before it, the report of the Senate Committee on Finance, 70th Congress, 1st Session, Report No. 273 (p. 5), states:

> "The bill provides for the *immediate* return of 80 per cent of the property now held by the Alien Property Custodian. This percentage was reached in the *agreement* above referred to and the parties affected are satisfied with it." (Italics ours.)

The word "immediate" is very important.

POINT VII.

Congress having provided for the immediate return of 80% of the property, it cannot be contended that this constitutes no obligation and that the few claimants who, through third party attachments and the like, suffered delay, are now subject to having their eighty per cent retaken or withheld.

The petitioners' brief and reply brief under-estimate the force of the commitments made by the United States with respect to this property. The effect of their argument is to contend either that the property has already been confiscated, or that the right to confiscation has been fully reserved. This is contrary to the historical record of what Congress has done in these cases. In addition, the petitioners make arguments as to confiscation which all departments of the Executive have rejected.

Petitioners state (pp. 14-15 of the reply brief):

> "Under the Treaty of Berlin, the property has been, in a sense, dedicated to the satisfaction of the obligations of the German Government. Under these circumstances, it is difficult to understand how any claimed rights of respondent with respect to this property can be said to be *private* property such as the Fifth Amendment is intended to protect."

It now seems fashionable to disregard the rights of private property and the obligation of contract. The mere fact that some branch or branches of the Government may wish to pursue an unlawful course is in many quarters deemed an ample defense against challenge. That this

will ultimately break down all our institutions seems not to be appreciated. It was fully appreciated by the founders of this Government, and it has always been the function of this Court to preserve those fundamental principles without which it is not possible for any government long to continue to function.

It has been shown in the respondent's original brief that Congress, at the request of the Administration, from 1926 to 1930 determined not to act upon the suggestion of the present petitioners that private property is "dedicated to the satisfaction of the obligations of the German Government". Their suggestion flouts the specifically declared intention of Congress from the very beginning in dealing with this problem.

But the argument is also unsound, for while Congress had certain privileges to confiscate under the Treaty of Berlin, it specifically refused to avail itself of those privileges. It refused to embark on the dishonorable policy of confiscating private property for the satisfaction of public debts. Yet the present petitioners blandly assert that under the Treaty of Berlin "the property has been, in a sense, dedicated to the satisfaction of the obligations of the German Government". That is precisely what the Settlement of War Claims Act and the Debt-Funding Agreement negative. They were designed to prevent any such assumption and to act on the contrary principle that we would respect the rights of private property, as President Wilson had said we would.

The petitioners, under the theory that the property is already as good as confiscated, necessarily therefore conclude that title to the still unreturned property amounting to a trifling percentage of the total amount seized has al-

ready vested in the United States, and they naturally infer that it is no longer "private property" at all. It would seem as if this argument ought to fall of its own weight, for everything in the record shows that Congress regarded it as private property from the very beginning and confirmed that view in the Settlement of War Claims Act.

The only issue here, therefore, is whether Congress can take back in time of peace what it has already returned, apply it to the few unlucky owners against whom third party attachments had been brought, and then give the President the discretionary power to select from among these few the specially favored aliens who, notwithstanding the Harrison Resolution, might still receive their property at his hands.

It would be well, in considering the arguments of the petitioners, to consider the views expressed upon them by the greatest living authority on these subjects. We refer to John Bassett Moore. In his work on International Law and Some Current Illusions published in 1924, (pp. 24-25) he has expressed in classic language his unfavorable view of the arguments of the petitioners. Judge Moore says:

> "The subject has also another aspect. During the past ten years the investments abroad of citizens of the United States have enormously increased, and the process has only begun. Considering the question, therefore, purely as one of selfish calculation, I venture to think it directly contrary to the interests of the United States to resuscitate the doctrine that enemy private property found in a country on the outbreak of war may be confiscated. Such a doctrine might even create a temptation.
>
> "But there is yet another and higher reason. The United States has an honorable past as well as an expedient future to consider.

"Of all the illusions a people can cherish, the most extravagant and illogical is the supposition that, along with the progressive degradation of its standards of conduct, there is to go a progressive increase in respect for law and morality. Again may we remark that 'there is no new thing under the sun.' The world never will be rid of the problem of preserving its elementary virtues. Three hundred years ago Grotius declared that, as he who violated the laws of his country for the sake of some present advantage to himself, 'sapped the foundation of his own perpetual interest, and at the same time that of his posterity,' so the people that 'violated the laws of nature and nations' broke down 'the bulwarks of its future happiness and tranquillity.'

"No less pertinent is the confession of Alexander Hamilton, made a century-and-a-quarter ago, that, serious as the evil of war had appeared to him to be, yet the manner in which it might be carried on was in his eyes 'still more formidable.' It was, said Hamilton, 'to be feared that, in the fermentation of certain wild opinions, those wise, just, and temperate maxims, which will forever constitute the true security and felicity of a state, would be overruled,' and that, one violation of justice succeeding another, measures would be adopted which even might 'aggravate and embitter the ordinary calamities of foreign war.'"

As recently as January, 1937, in the Harvard Law Review, Judge Moore has again expressed his condemnation of the emotional hypocrisy which pursues evil practices under righteous pretenses. We venture to quote from Judge Moore's article entitled "Fifty Years of International

Law", pages 419 to 421 (Harvard Law Review, Vol. L, No. 3, January, 1937):

> "Prior to the Versailles and associated treaties the development of international law had for centuries run in the direction of exempting private property from confiscation, not out of regard for insensate things but in the belief that it was in the general interest that war-stricken peoples, instead of being plundered and permanently disabled, should be permitted to resume the normal processes of peaceful life without delay. In the recent war this principle began to be questioned, and in the making of peace it was broadly disregarded on assumptions that will not bear examination. I particularly refer to the supposition that in its drafts on population and resources the recent war was unlike any previous war; that it made all work war-work and all the people war-workers in a sense never known before, and that, as it was to be taken as the type of future wars, the distinction between combatants and non-combatants and the rules deduced from it were no longer to be respected. In reality these assumptions, which I do not hesitate to pronounce essentially unfounded, represent a reversion to the ancient conception that all the inhabitants of states at war, including women and children, are to be regarded, collectively and individually, as actual enemies so that they may be lawfully slaughtered or reduced to slavery and their property captured and confiscated or destroyed. In protesting against this barbarous theory, Grotius quoted the great Roman historian Livy, who censured the 'savage cruelty and rage' of those who practiced it. There never was, indeed, a time when in great conflicts the belligerents did not draw upon and coordinate all their resources for hostile purposes; and the losses

of life and property in the recent war were relatively less than those in various earlier wars.

"The distinctive designation of the recent conflict as 'the world war' or the 'first' world war merely exemplifies the want of knowledge or carelessness of those who thus speak. Although nations at war formerly reached their objectives more slowly, they gained them not less surely, and empires were won and lost by the European powers in conflicts in which they engaged face to face in Europe, in America, in Africa, and in Asia. As examples it suffices to mention the Seven Years' War, the wars growing out of the French Revolution, and the Napoleonic wars. It was because they knew war's universal drain and reactionary tendencies that the earlier writers sought not only to limit the taking of life but also to restrict the destruction and confiscation of property.

"Nevertheless, soon after the outbreak of the recent war the belligerent governments one after another proceeded to assume control of or, as was generally said, to 'intern' enemy private property found within their jurisdiction. The United States, on entering the war, imitated its associates by enacting a law for the provisional seizure of enemy property, which was to be held by an official styled the Alien Property Custodian, whose function was defined as that of a trustee. Subsequently, however, there came a special revelation, perhaps not divinely inspired, to the effect that the foreign traders and manufacturers, whose property had been seized, had for years been making their investments in the United States not from ordinary motives of profit but in pursuance of a hostile design, never before suspected, to enrich themselves by ruining American traders and manufacturers; and on this thrifty but disreputable pretext the Government of

the United States, disregarding the injunctions of its earlier statesmen and its own honorable past, yielded to a patriotic call to a retributive but profitable war on the malefactors' property, and departures were progressively made from the principle of trusteeship. In other countries, including Great Britain, a similar departure from prior enlightened practices was made.

"What happened to enemy private property during and after the late war may serve to accentuate the duty of each generation to consider its conduct and search its motives, under a deep sense of its responsibility to future generations and uninfluenced by that emotional hypocrisy which so constantly facilitates a reversion to evil practices under righteous pretenses."

We respectfully submit that the judgment of the Court below should be affirmed.

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property. In March, 1931, Sprunt and others brought an action in the supreme court of the District of Columbia against respondent; a warrant of attachment issued and, pursuant to it, the marshal levied on the money and property so held; because of the attachment petitioners refused to deliver it to respondent and retained custody. In May, 1934, that action was discontinued by plaintiffs and the attachment was released. July 1, 1934, the office of Custodian ceased; his powers and duties were transferred to the Department of Justice; all money and property held by or in trust for him was transferred to the Attorney General. Before commencement of this suit, respondent demanded and petitioners refused delivery of that here in question. Their refusal was based on Public Resolution No. 53.

The questions for decision are whether that resolution withdrew from the trial court jurisdiction to entertain the bill, and whether it deprives respondent of its property without due process of law in contravention of the Fifth Amendment.

1. This is in substance a suit against the United States. *Banco Mexicano* v. *Deutsche Bank*, 263 U. S. 591, 603. *Becker Co.* v. *Cummings*, 296 U. S. 74, 78. By the Trading with the Enemy Act of 1917, § 9 (a) (b) (c),[2] as amended by the Settlement of War Claims Act, § 11,[3] the United States consented, in respect of claims such as the one here in question, to be sued in the supreme court of the District of Columbia. Petitioners maintain Resolution No. 53 withdrew that consent.

The recitals of that resolution disclose reasons for its adoption. They are: A joint resolution of July 2, 1921,[4] declared that property of German nationals held under the Trading with the Enemy Act should be retained and no disposition thereof made, except as specifically provided by law, until the German Government should make suitable provision for the satisfaction of claims of American nationals against it. The Treaty of Berlin, August 25, 1921,[5] accorded to the United States all rights and advantages

[2] Act of October 6, 1917, § 9, 40 Stat. 419, as amended by Acts: July 11, 1919, 41 Stat. 35; June 5, 1920, 41 Stat. 977; February 27, 1921, c. 76, 41 Stat. 1147; December 21, 1921, c. 13, 42 Stat. 351; December 27, 1922, c. 13, 42 Stat. 1065; March 4, 1923, § 1, 42 Stat. 1511; May 7, 1926, c. 252, 44 Stat. 406.

[3] Act of March 10, 1928, 45 Stat. 270.

[4] 42 Stat. 105.

[5] 42 Stat. 1939.

specified in the resolution of July 2, 1921, including those stipulated for its benefit in the Treaty of Versailles,[6] not ratified by the United States. The agreement of August 10, 1922,[7] established a Mixed Claims Commission to adjudicate claims of American nationals against Germany. And, in the debt-funding agreement of June 23, 1930,[8] Germany agreed to pay the United States on account of its awards 40,800,000 reichmarks in each year until 1981. Germany was in arrears under that agreement and had failed to make provision for satisfaction of claims established against it.

Therefore, the resolution declared: So long as Germany is in arrears in respect of obligations mentioned, all deliveries of property authorized to be made under the Trading with the Enemy Act of 1917, as amended, or the Settlement of War Claims Act of 1928 as amended, "whether or not a judgment or decree has been entered with respect thereto, shall be postponed and the money or property, or the income, issues, profits, and/or avails thereof reserved . . . Provided . . . That the President may, in his sole discretion, remove the restriction as to any of the cases . . . in relation to which . . . deliveries have been postponed under this resolution . . ."

The consent of the United States to be sued was revocable at any time. *Lynch* v. *United States*, 292 U. S. 571, 581. It has not been expressly recalled and, unless by Resolution No. 53 impliedly withdrawn, the supreme court of the District had jurisdiction to entertain the complaint. Continuation of the consent was not inconsistent with the purpose of the resolution. The measure was adopted because of Germany's default which, as indicated by the context, was assumed not to be permanent. It was intended only temporarily to postpone final disposition of the seized property, merely to stay deliveries whether directed by administrative order or judgment of a court. Claimants may have deliveries whenever Germany ceases to be in arrears. Fulfillment of her promises will end the restraint imposed by the resolution. Postponement of deliveries does not suggest intention to withdraw consent to be sued. It was given and long continued in order to safeguard former owners against erroneous

[6] Sen. Doc. No. 348, 67th Cong., 4th Sess., p. 3329.
[7] 42 Stat. 2200.
[8] Report of the Secretary of the Treasury, 1930, p. 341.

administration of measures enacted for their benefit. Neither need nor reason has been suggested for change of policy in that regard. In the absence of unmistakable expression of purpose to that end, it may not reasonably be inferred that Congress intended to withdraw that protection. Cf. *Becker Co.* v. *Cummings, supra*, 80. We find nothing to warrant that inference. *District of Columbia* v. *Eslin*, 183 U. S. 62, gives no support to petitioners' contention. Clearly the trial court had jurisdiction to entertain the complaint.

2. Public Resolution No. 53 is not repugnant to the Fifth Amendment. By exertion of the war power, and untrammeled by the due process or just compensation clause, Congress enacted laws directing seizure, use and disposition of property in this country belonging to subjects of the enemy. Alien enemy owners were divested of every right in respect of the money and property seized and held by the Custodian under the Trading with the Enemy Act. *United States* v. *Chemical Foundation*, 272 U. S. 1, 9-11. *Woodson* v. *Deutsche, etc., Vormals*, 292 U. S. 449, 454. The title acquired by the United States was absolute and unaffected by definition of duties or limitations upon the power of the Custodian or the Treasurer of the United States. Congress reserved to itself freedom at any time to dispose of the property as deemed expedient and right under circumstances that might arise during and after the war. Legislative history and terms of measures passed in relation to alien enemy property clearly disclose that from the beginning Congress intended after the war justly to deal with former owners and, by restitution or compensation in whole or part, to ameliorate hardships falling upon them as a result of the seizure of their property.[9] But that intention detracted nothing from title acquired by the United States or its power to retain or dispose of the property upon such terms and conditions as from time to time Congress might direct. As the taking left in enemy owners no beneficial right to, or interest in, the property, the United States did not take or hold as trustee for their benefit.

Respondent maintains that § 11 of the Settlement of War Claims Act of 1928, amending § 9 of the Trading with the Enemy Act of

[9] Sen. Rep. No. 113, 65th Cong., 1st Sess. Trading with the Enemy Act of October 6, 1917, § 12, 40 Stat. 423. Public Resolution No. 8, July 2, 1921, § 5, 42 Stat. 106. Cong. Rec., Vol. 61, Part 4, p. 3249. Winslow Act of March 4, 1923, § 2, 42 Stat. 1516, adding § 23 to Trading with the Enemy Act. Sen. Rep. No. 273, 70th Cong., 1st Sess., pp. 12-13. Settlement of War Claims Act of March 10, 1928, 45 Stat. 254.

1917 as amended, vested in former owners an immediate right to the return of their property and that, having complied with the provisions of the Act, they cannot be deprived of that right. It argues that its interest in the property taken was not "completely and irrevocably destroyed" and that the Settlement of War Claims Act was an Act under which it "could and did obtain a vested interest in its property." To the extent that the argument rests upon the assumption that the taking did not divest enemy owners of every right or that the United States did not acquire absolute title, it is fallacious and need not be noticed.

The Settlement of War Claims Act was not a conveyance and did not grant former owners any right or title to, or interest in, the money or property taken by the Custodian. As amended by it, pertinent provisions of the Trading with the Enemy Act are indicated in the margin.[10] No change of title was effected by that Act; and in proceedings under it none takes place before delivery to claimant. As the United States owned all, claimant's consent to postponement of delivery of part did not improve its position as to the rest. The President did not order delivery. Action by him was neither a condition precedent nor a bar to suit. The statute, § 9 (a), required the money and property to be retained by the Custodian or Treasurer until final judgment for claimant should be satisfied by delivery, or until final judgment

[10] Section 9 (b) of the Trading with the Enemy Act, as amended by § 11 of the Settlement of War Claims Act, 45 Stat. 270—in substance so far as pertinent here—declares that if the President shall determine that the owner at the time of the taking was a German corporation and that written consent (provided for in subsection (m) of § 9 as amended) to postponement of return of 20 per cent of the money or property has been filed, then the President without any application being made therefor "may order the payment, conveyance, transfer, assignment, or delivery of such money or other property held by the Alien Property Custodian or by the Treasurer of the United States" to the owner from whom taken.

Section 9 (c) declares that any person whose property the President is authorized to return under the provisions of subsection (b) (and plaintiff's predecessor is such a person) may serve notice of claim for the return of the money or property taken from him as provided in subsection 9 (a) (which relates to claims by others than enemies for property taken from them by the Custodian) and thereafter "may make application to the President for allowance of such claim and/or may institute suit in equity to recover such money or other property, as provided in said subsection, and with like effect. The President or the court, as the case may be, may make the same determinations with respect to citizenship and other relevant facts that the President is authorized to make under the provisions of subsection (b) hereof."

And § 9(a) provides that any person not an enemy or ally of an enemy claiming money or property taken by the Custodian may file with him a notice of claim under oath and in form and substance as required; and the President, if application is made by claimant, may order the payment or delivery to claimant of

against claimant. It is clear that when the resolution was adopted respondent had neither title nor vested right to have delivery.

The grant to former alien enemy owners of the privilege of becoming entitled upon conditions specified to have returned to them the property of which they had been deprived by exertion of the war power of the United States was made by the Congress in mitigation of the taking and in recognition of "the humane and wise policy of modern times." *Brown* v. *United States,* 8 Cr. 110, 123. In *United States* v. *White Dental Co.,* 274 U. S. 398, it appeared that during the war the German government sequestered the property of a German corporation which, through ownership of all its capital stock, was controlled by an American corporation. Speaking of the taking we said (pp. 402-403): "What would ultimately come back to it [the American owner], as the event proved, might be secured not as a matter of right, but as a matter either of grace to the vanquished or exaction by the victor . . . It would require a high degree of optimism to discern in the seizure of enemy property by the German government in 1918 more than a remote hope of ultimate salvage from the wreck of the war." We think it clear that the grant by the Settlement of War Claims Act was made as a matter of grace and so was subject to withdrawal by Congress. *United States* v. *Teller,* 107 U. S. 64, 68. *Frisbie* v. *United States,* 157 U. S. 160, 166. *Lynch* v. *United States, supra,* 577. The resolution does not infringe the Fifth Amendment.

Reversed.

Mr. Justice ROBERTS took no part in the consideration or decision of this case.

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the money or property so held by the Custodian or Treasurer. If the President shall not so order within 60 days or if the claimant shall have filed the required notice and made no application, then claimant may institute a suit in equity "to establish the interest, right, title . . . so claimed, and if so established the court shall order the payment, conveyance, transfer, assignment, or delivery to said claimant of the money or other property so held by the Alien Property Custodian or by the Treasurer of the United States or the interest therein to which the court shall determine said claimant is entitled. If suit shall be so instituted, then such money or property shall be retained in the custody of the Alien Property Custodian, or in the Treasury of the United States, as provided in this Act, and until any final judgment or decree which shall be entered in favor of the claimant shall be fully satisfied by payment or conveyance, transfer, assignment, or delivery by the defendant, or by the Alien Property Custodian, or Treasurer of the United States on order of the court, or until final judgment or decree shall be entered against the claimant or suit otherwise terminated".